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ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY

2017

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EXPLANATORY NOTE

Until 1990, the OAS General Secretariat published the "Final Acts" and "Annual Reports of the Inter-American Juridical Committee" under the series classified as "Reports and Recommendations". In 1997, the Department of International Law of the Secretariat for Legal Affairs began to publish those documents under the title "Annual Report of the Inter-American Juridical Committee to the General Assembly."

According to the "Classification Manual for the OAS official records series", the Inter-American Juridical Committee is assigned the classification code OEA/Ser. Q, followed by CJI, to signify documents issued by this body (see attached lists of Resolutions and documents).

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INTRODUCTION

The Inter-American Juridical Committee is honored to submit to the General Assembly of the Organization of American States its Annual Report on the activities carried out during the year 2017, in accordance with the terms of Article 91.f of the Charter of the Organization of American States and Article 13 of its Statutes, and with the instructions contained in General Assembly Resolutions dealing with the preparation of annual reports by the organs, agencies, and entities of the Organization, such as resolutions AG/RES. 2806 (XLIII-O/13), AG/RES. 2849 (XLIV-O/14), AG/RES. 2873 (XLV-O/15) and AG/RES. 2909 (XLVII-O/17), all of which were approved over the past years.

In 2017, the Inter-American Juridical Committee held two working meetings. The first meeting, its 90th Regular Session, took place March 6-10; while the second meeting, its 91st Regular Session, took place August 7-16, both at the headquarters building in Rio de Janeiro, Brazil.

On these occasions, the plenary Committee approved two reports in response to the mandates issued by the OAS General Assembly: "Conscious and Effective Regulation of Business in the Area of Human Rights" (CJI/doc.522/17 rev. 2); and "Cultural Heritage Assets" (CJI/doc.527/17 rev. 2.). In the first of these reports, the Committee puts forward a collection of best practices, legislation and legal precedents dealing with the subject matter and proposes alternatives aimed at advancing in conscious and effective regulation of businesses. As for the protection of cultural assets report, the Committee proposes consolidating national legislation, urges ratification of the 1970 UNESCO and 1976 OAS Conventions, and calls on States to set up cooperation mechanisms to aid in the implementation thereof, based on analysis of available regional as well as universal instruments. There was also a pronouncement issued by the Committee on the subject of jurisdictional immunity of States and statelessness.

During the period encompassed by this report, the Committee approved consideration of two new topics, which were added to the agenda *sua sponte*: "validity of foreign judicial decisions in light of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards," and "binding and non-binding agreements," the latter topic arising from an exchange between legal counsel of ministries of foreign affairs, held in October 2016.

Lastly, the plenary of the Juridical Committee decided to keep consideration of the following topics on the agenda: immunity of international organizations; law applicable to international contracts; representative democracy; and, guide for the application of the principle of conventionality.

It must be noted that at its last working meeting the CJI was pleased with the decision of the OAS General Assembly to request the Permanent Council to grant due consideration of its most recent resolutions and reports on the subject of cultural heritage assets; conscious and effective regulation of business in the area of human rights; and electronic warehouse receipts for agricultural products.

This Annual Report is about the studies conducted on the aforementioned topics and is divided into three chapters. The first chapter explains the origins, legal basis and the structure of the Inter-American Juridical Committee and provides an account of the meetings, which took place over the year. The second chapter describes the topics fleshed out by the Juridical Committee and includes the texts of the approved resolutions and specific documents. Lastly, the third chapter recounts the activities carried out by the Committee and its members over the past year. As is customary, a detailed list of the approved resolutions and documents are attached to the Report as an annex.

The Annual Report of 2017 has been approved as drafted by Dr. Hernán Salinas Burgos in his capacity as Chair of the Inter-American Juridical Committee.

All this information may be accessed at the webpage of the Inter-American Juridical at:

http://www.oas.org/en/sla/iajc/inter-american_juridical_committee.asp

CHAPTER I

1. The Inter-American Legal Committee: its origin, legal bases, structure and purposes

The forerunner of the Inter-American Juridical Committee was the International Board of Jurists in Rio de Janeiro, created by the Third International Conference of American States in 1906. Its first meeting was in 1912, although the most important was in 1927. There, it approved twelve draft conventions on public international law and the Bustamante Code in the field of private international law.

Then in 1933, the Seventh International Conference of American States, held in Montevideo, created the National Commissions on Codification of International Law and the Inter-American Committee of Experts. The latter's first meeting was in Washington, D.C. in April 1937.

The First Meeting of Consultation of Ministers of Foreign Affairs of the American Republics, held in Panama, September 26 through October 3, 1939, established the Inter-American Neutrality Committee, which was active for more than two years. Then in 1942, the Third Meeting of Consultation of Ministers of Foreign Affairs, held in Rio de Janeiro, adopted Resolution XXVI, wherein it transformed the Inter-American Neutrality Committee into the Inter-American Juridical Committee. It was decided that the seat of the Committee would be in Rio de Janeiro.

In 1948, the Ninth International Conference of American States, convened in Bogotá, adopted the Charter of the Organization of American States, which *inter alia* created the Inter-American Council of Jurists, with one representative for each Member State, with advisory functions, and the mission to promote legal matters within the OAS. Its permanent committee would be the Inter-American Juridical Committee, consisting of nine jurists from the Member States. It enjoyed widespread technical autonomy to undertake the studies and preparatory work that certain organs of the Organization entrusted to it.

Almost 20 years later, in 1967, the Third Special Inter-American Conference convened in Buenos Aires, Argentina, adopted the Protocol of Amendments to the Charter of the Organization of American States or Protocol of Buenos Aires, which eliminated the Inter-American Council of Jurists. The latter's functions passed to the Inter-American Juridical Committee. Accordingly, the Committee was promoted as one of the principal organs of the OAS.

Under Article 99 of the Charter, the purpose of the Inter-American Juridical Committee is as follows:

> ... to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Under Article 100 of the Charter, the Inter-American Juridical Committee is to:

> ... undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences.

Although the seat of the Inter-American Juridical Committee is in Rio de Janeiro, it may meet elsewhere after consulting the Member State concerned. This advisory body of the Organization on legal affairs consists of eleven jurists who are nationals of the Member States of the Organization. Together, those jurists represent all the States and enjoy as much technical autonomy as possible.

2. Period covered by the Annual Report of the Inter-American Juridical Committee

A. Ninetieth regular session

The 90th regular session of the Inter-American Juridical Committee took place on March 6 to 10, 2017, at its headquarters in Rio de Janeiro, Brazil.

The Members of the Inter-American Juridical Committee present for that regular session were the following, listed in the order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28.b of the "Rules of Procedure of the Inter-American Juridical Committee":

Dr. Alix Richard
Dr. Joel Hernández García
Dr. Ruth Stella Correa Palacio
Dr. João Clemente Baena Soares
Dr. José Antonio Moreno Rodríguez
Dr. Hernán Salinas Burgos
Dr. Duncan B. Hollis
Dr. Juan Cevallos Alcívar
Dr. Ana Elizabeth Villalta Vizcarra
Dr. Carlos Mata Prates

Dr. Miguel Aníbal Pichardo Olivier did not attend the session.

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law; Luis Toro Utillano and Jeannette Tramhel Senior Legal Officers; and, Maria Lúcia Iecker Vieira as well as Maria C. de Souza Gomes, all of the Secretariat of the Inter-American Juridical Committee.

The Inter-American Juridical Committee had before it the following agenda, adopted by means of Resolution CJI/RES. 229 (LXXXIX-O/16), "Agenda for the Ninetieth Regular Session of the Inter-American Juridical Committee":

CJI/RES. 229 (LXXXIX-O/16)

AGENDA FOR THE NINETIETH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, as of 6 March, 2017)

Current topics:

1. Conscious and effective regulation of business in the area of human rights
   Rapporteur: Dr. Ana Elizabeth Villalta Vizcarra
2. Protection of cultural heritage
   Rapporteur: Dr. Joel Hernández García
3. Immunity of States
   Rapporteur: Dr. Carlos Alberto Mata Prates
4. Immunity of international organizations
   Rapporteur: Dr. Joel Hernández García

5. Law applicable to international contracts
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and José Antonio Moreno Rodríguez
6. Representative democracy
   Rapporteur: Dr. Hernán Salinas Burgos
7. Guide for the application of the principle of conventionality
   Rapporteur: Dr. Ruth Stella Correa Palacio
8. Considerations on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law
   Rapporteur: Dr. Ruth Stella Correa Palacio
9. Mechanisms for online settlement of disputes arising from cross-border consumer transactions
   Rapporteur: Dr. José Antonio Moreno Rodríguez
10. Guide for the protection of statelessness persons
    Rapporteur: Dr. Carlos Alberto Mata Prates

This resolution was unanimously adopted at the session held on October 13, 2016 by the following members: Drs. David P. Stewart, Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot and José A. Moreno Rodríguez.

It must be noted that the decision of the "Date and venue of the 90th regular session of the Inter-American Juridical Committee" was made in October, 2016, under resolution CJI/RES. 228 (LXXXIX-O/16).

CJI/RES. 228 (LXXXIX-O/16)

DATE AND VENUE OF THE NINETIETH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statute provides for two annual regular sessions;

BEARING IN MIND that article 14 of its Statute states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil;

RESOLVES to hold its 90th regular session from March 6, 2017, in the city of Rio de Janeiro.

This resolution was approved unanimously at the meeting held on October 13, 2016, by the following members: David P. Stewart, Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot, and José Antonio Moreno Rodríguez.

B. Ninetieth first regular session

The 91st Regular Session of the Inter-American Juridical Committee took place on August 7 to 16, 2017, at its headquarters in the city of Rio de Janeiro, Janeiro, Brazil.

The members of the Inter-American Juridical Committee present for that regular session were the following, listed in the order of precedence determined by the lots drawn at the session's

first meeting and in accordance with Article 28.b of the Rules of Procedure of the Inter-American Juridical Committee:

Dr. Ana Elizabeth Villalta Vizcarra
Dr. Joel Hernández García
Dr. Ruth Stella Correa Palacio
Dr. João Clemente Baena Soares
Dr. Juan Cevallos Alcívar
Dr. José Antonio Moreno Rodríguez
Dr. Hernán Salinas Burgos
Dr. Alix Richard
Dr. Duncan B. Hollis
Dr. Carlos Mata Prates

Dr. Miguel Aníbal Pichardo was not present due to work reasons.

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law; Luis Toro Utillano, Principal Legal Officer with that same Department; and Maria Lúcia Iecker Vieira as well as Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

At the beginning of the sessions, the Chairman of the Committee, Dr. Hernán Salinas Burgos, announced the results of the election by the General Assembly (held in Cancun, Mexico, in June of 2017) of persons who will be part of the Committee as of January 1, 2018. In this regard, the Committee will have two new members: Doctors Luis Garcia Corrochano of Peru and Miguel Angel Espeche Gil of Argentina, who had been a member in the past, as well as informing that he had been re-elected for a new mandate of four years until December 31, 2021.

At its 91st Regular Session, the Inter-American Juridical Committee had before it the following agenda, which was adopted by means of resolution CJI/RES. 231 (XCI-O/17) "Agenda for the Ninety-First Regular Session of the Inter-American Juridical Committee":

CJI/RES. 231 (XCI-O/17)

AGENDA FOR THE NINETY-FIRST REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, as of August 7, 2017)

Current topics:

1. Immunity of international organizations
   Rapporteur: Dr. Joel Hernández García
2. Law applicable to international contracts
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and José Antonio Moreno Rodríguez
3. Representative democracy
   Rapporteur: Dr. Hernán Salinas Burgos
4. Guide for the application of the principle of conventionality
   Rapporteur: Dr. Ruth Stella Correa Palacio
5. Online arbitration arising from cross-border consumer transactions
   Rapporteurs: Drs. José Antonio Moreno Rodríguez and Ana Elizabeth Villalta Vizcarra
6. Binding and non-binding agreements
   Rapporteur: Dr. Duncan B. Hollis

7. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards
   Rapporteur: Dr. Ruth Stella Correa Palacio

This resolution was unanimously adopted at the session held on March 10, 2017 by the following members: Doctors Alix Richard, Joel Antonio Hernández García, Ruth Stella Correa Palacio, João Clemente Baena Soares, José Antonio Moreno Rodríguez, Hernán Salinas Burgos, Duncan B. Hollis, Ana Elizabeth Villalta Vizcarra and Carlos Mata Prates.

At that occasion, the plenary of the Inter-American Juridical Committee decided to hold its next session between February 26 and March 2, 2018, in Mexico City, Mexico, through resolution CJI/RES. 234 (XCI-O/17), "Date and Venue of the Ninetieth Second Regular Session of the Inter-American Juridical Committee".

The Committee also approved its agenda for the upcoming session, consisting of eight topics, as listed in resolution CJI/RES. 235 (XCI-O/17), "Agenda for the Ninety-Second Regular Session of the Inter-American Juridical Committee" between February 26 and March 2, 2018.

CJI/RES. 234 (XCI-O/17)

DATE AND VENUE OF THE NINETY-SECOND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statutes provides for the annual holding of regular session;

BEARING IN MIND that article 14 of its Statutes establishes that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil. However, in special cases, the Committee may hold meetings in any other place that it may duly designate.

RESOLVES to hold its 92nd regular session in Mexico City as of 26 February 2018.

This resolution was unanimously approved at the session held on 11 August 2017, by the following members: Doctors Ana Elizabeth Villalta Vizcarra, Joel Antonio Hernández García, Ruth Stella Correa Palacio, João Clemente Baena Soares, Juan Cevallos Alcívar, José Antonio Moreno Rodríguez, Hernán Salinas Burgos, Alix Richard, Duncan B. Hollis, and Carlos Mata Prates.

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CJI/RES. 235 (XCI-O/17)

AGENDA FOR THE NINETY-SECOND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Mexico City, D. F., Mexico from February 26th to March 2th, 2018)

Current topics:

1. Immunity of international organizations
   Rapporteur: Dr. Joel Hernández García
2. Law applicable to international contracts
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and José Antonio Moreno Rodríguez
3. Representative democracy
   Rapporteur: Dr. Hernán Salinas Burgos
4. Guide for the application of the principle of conventionality
   Rapporteur: Dr. Ruth Stella Correa Palacio
5. Online arbitration arising from cross-border consumer transactions
   Rapporteurs: Drs. José Antonio Moreno Rodríguez and Ana Elizabeth Villalta Vizcarra
6. Binding and non-binding agreements
   Rapporteur: Dr. Duncan B. Hollis
7. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards
   Rapporteur: Dr. Ruth Stella Correa Palacio

This resolution was unanimously approved at the session held on 15 August, 2017, by the following members: Doctors Ana Elizabeth Villalta Vizcarra, Joel Antonio Hernández García, Ruth Stella Correa Palacio, Juan Cevallos Alcívar, José Antonio Moreno Rodríguez, Hernán Salinas Burgos, Alix Richard, Duncan B. Hollis, and Carlos Mata Prates.

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At the end of the session, the Juridical Committee took time to pay homage to Drs. Ana Elizabeth Villalta Vizcarra y Miguel Aníbal Pichardo Olivier, whose terms come to an end on December 31, 2017. These members were recognized for their invaluable commitment to the development and codification of International Law and the Inter-American System. Considering the career path of Dr. Villalta, who has been a member of the Committee since 2004, and was the first woman to serve as Vice Chair of the Committee, the many contributions she made in a variety of areas of international law were highlighted, including protection of cultural assets in situations of armed conflict; protection of cultural heritage assets; conscious and effective regulation of business in the area of human rights; extra-contractual civil liability; CIDIP-VII (the 7th Inter-American Specialized Conference on Private International Law); law applicable to international contracts; and consumer protection.

CJI/RES. 236 (XCI-O/17)

TRIBUTE TO DOCTOR ELIZABETH VILLALTA VIZCARRA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on the 31st December of 2017 Doctor Ana Elizabeth Villalta Vizcarra will terminate her mandate;

RECALLING that Doctor Ana Elizabeth Villalta Vizcarra has been a member of the Committee since January of 2002, with four consecutive mandates and having served as Vice-President in 2004, in addition to being the first woman elected in the hemisphere to hold a position on the Inter-American Juridical Committee;

AWARE of the valuable contribution made by Doctor Ana Elizabeth Villalta Vizcarra to the work of the Committee throughout her mandates, and equally aware that her reports have been of incomparable assistance to the development and codification of International Law and the Inter-American System. She was in charge of Rapporteurships in the field of both public and private international law, with outstanding work in the reports presented on the many following issues: improving the administration of justice; the struggle against corruption; the situation of migrant workers and their families; the Inter-American Democratic Charter; refugees; sexual orientation, identity and gender and the expression of gender; protection of cultural assets in cases of armed conflict; protection of cultural assets; the conscious and effective regulation of companies in the sphere of human rights; in the area of private international law, the theme of extra-contractual civil responsibility; the CIDIP-VII; and the law applicable to international contracts, and protection of consumers;

HIGHLIGHTING the professionalism demonstrated by Doctor Ana Elizabeth Villalta Vizcarra, as well as he many personal qualities, among which her legal and academic culture, in addition to her cordiality, leadership and intellectual curiosity, all of which inspired her to cooperate at all times with the other Rapporteurs and distinguished her among all her colleagues on the Committee,

RESOLVES:

1. To express its sincere gratitude to Doctor Ana Elizabeth Villalta Vizcarra for her dedication and invaluable contribution to the work of the Inter-American Juridical Committee;

2. To wish her every success in her future work, together with the hope that she continues her relationship with the Inter-American Juridical Committee;

3. To send this Resolution to the agencies of the Organization.

This Resolution was unanimously approved by the following members at the session held on 15 August 2117: Drs. Joel Antonio Hernández García, Juan Cevallos Alcívar, Hernán Salinas Burgos, Alix Richard, Duncan B. Hollis and Carlos Mata Prates.

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CJI/RES. 237 (XCI-O/17)

HOMAGE PAID TO DOCTOR MIGUEL ANÍBAL PICHARDO OLIVIER

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Doctor Miguel Aníbal Pichardo Olivier will terminate his mandate on December 31st 2017;

RECALLING that Doctor Pichardo Olivier has been a member of the Committee since January 2010;

AWARE of the valuable contribution made by Doctor Pichardo Olivier throughout the course of his mandates to the work carried out by the Committee, and that his interventions constituted an inestimable subsidy to the development and codification of international law and to the inter-American system;

EMPHASIZING the many personal and professional qualities of Doctor Pichardo Olivier, among which special mention should be made of his juridical and academic erudition and the affability that distinguished him among his fellow members of the Committee,

RESOLVES:

1. To express its sincere gratitude to Doctor Miguel Aníbal Pichardo Olivier for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee;

2. To wish him every success in his future work, together with the hope that he continues his relationship with the Inter-American Juridical Committee; and

3. To send this resolution to the agencies of the Organization.

This resolution was unanimously approved at the session held on 15 August, 2017, by the following members: Doctors Ana Elizabeth Villalta Vizcarra, Joel Antonio Hernández García, Juan Cevallos Alcívar, Hernán Salinas Burgos, Alix Richard, Duncan B. Hollis, and Carlos Mata Prates.

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CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2017

THEMES UNDER CONSIDERATION

In 2017, the Inter-American Juridical Committee held two working meetings, on these occasions, the plenary Committee approved two reports in response to the mandates issued by the OAS General Assembly: "Conscious and Effective Regulation of Business in the Area of Human Rights" (CJI/doc.522/17 rev. 2); and "Cultural Heritage Assets" (CJI/doc.527/17 rev. 2.).

In the first of these reports, the Committee puts forward a collection of best practices, legislation and legal precedents dealing with the subject matter and proposes alternatives aimed at advancing in conscious and effective regulation of businesses. As for the protection of cultural assets report, the Committee proposes consolidating national legislation, urges ratification of the 1970 UNESCO and 1976 OAS Conventions, and calls on States to set up cooperation mechanisms to aid in the implementation thereof, based on analysis of available regional as well as universal instruments. There was also a pronouncement issued by the Committee on the subject of jurisdictional immunity of States and statelessness.

During the period encompassed by this report, the Committee approved consideration of two new topics, which were added to the agenda *sua sponte*: "validity of foreign judicial decisions in light of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards," and "binding and non-binding agreements," the latter topic arising from an exchange between legal counsel of ministries of foreign affairs, held in October 2016.

Lastly, the plenary of the Juridical Committee decided to keep consideration of the following topics on the agenda: immunity of international organizations; law applicable to international contracts; representative democracy; and, guide for the application of the principle of conventionality.

Following there is a presentation of the aforementioned topics, along with, where applicable, the documents on those topics prepared and approved by the Inter-American Juridical Committee.

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1. Immunity of International Organizations

Document

CJI/doc. 545/17 rev.1	Immunities of international organizations: documents for comments (Presented por el doctor Joel Hernández García)

During the 81st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2012), Dr. David P. Stewart proposed to the plenary creating an instrument on immunity of States in transnational litigation. He reported that in 1986 a draft Convention on immunity of States introduced by the Juridical Committee did not go anywhere. Additionally, he noted that the United Nations Convention on Jurisdictional Immunities of States and Their Property has still not come into force. He also stressed that States do not have adequate laws on the topic. In his explanation, Dr. Stewart described the positive effects that an instrument on this subject area could have in the field of trade, in addition to serving as a guide for government officials.

The Committee has only followed up on the subject of immunity of States until the 86ths Regular Session (2015).

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2015), the plenary Committee decided to divide up the treatment of the subject of immunities and appoint a Rapporteur to be in charge of immunity of international organizations. Dr. Hernández García was appointed to the position and undertook to submit a preliminary report at the next regular session.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. Hernández García, Rapporteur for the topic, submitted his report, document CJI/doc.486/15 and thanked the Secretariat, particularly Dr. Christian Perrone, for his assistance in drafting the preliminary document to serve as the basis for the actual report (DDI/doc. 5/15).

He explained the development of the topic in the Committee and what he has done as Rapporteur since he was appointed in March of the current year. He was pleased at the decision to separate the field of immunities into two sub-topics to be addressed by the Committee: immunities of States and of international organizations. He noted that 12 responses to the questionnaire conducted in 2013 were received from the following States: Bolivia, Brazil, Colombia, Costa Rica, El Salvador, United States, Jamaica, Mexico, Panama, Paraguay, Dominican Republic and Uruguay. Based on the responses provided to the Committee, he was able to establish that only the United States and Jamaica have a national law. The majority of the countries address this issue through international instruments, mainly through headquarters agreements.

As for exceptions to immunity for acts of commerce, he remarked that his study also helped him to ascertain the use of international agreements or treaties to serve as guidelines. He also established inconsistencies among the legal precedents of the countries.

Next, he made reference to the last question on the *questionnaire* regarding provisions of law applied by the judiciary, with most States alluding to international custom, though he did not mention what he considered to be the normative content of the customary law.

He outlined as a first conclusion that it is the practice of States to deal with immunities of International Organizations on a case-by-case basis.

He also commented on the European Court of Human Rights case establishing a limitation on immunity of international organizations, clearly indicating that immunity cannot impede access to justice in light of respect for the right to due process, and the possibility of providing for reparation for damages. In the view of the Rapporteur, this decision shows that immunities of international organizations is following a parallel path to the concept of functional immunities (*rationae materiae* immunity) of States, inasmuch as it is prohibited to leave persons defenseless.

As a product of his study, the Rapporteur proposed the creation of guiding principles on the application of immunities of international organizations. He cited three possible sources of law to establish general principles: 1) national laws; 2) headquarters agreements; and 3) national legal precedents. Additionally, his study included developments on the extension of immunities in general; exceptions granted by treaty, law and jurisprudence; the scope of the limitations on commercial matters; respect for national legal order; and, remedies to cure violations.

Dr. Salinas noted that the instruments adopted by most important organizations, such as the UN or the OAS, refer to common principles; while other organizations lay out distinctions, which would require verification on a case-by-case basis. As for progressive development, he called for examining the issue of the limitations stemming from human rights, which would help to generate a new perspective on the subject matter.

Dr. Correa Palacio noted that in labor matters, the applicable judicial norm must be verified and identified. She claimed that often when damages occur, there is no person responsible against whom a case can be adjudicated and, therefore, there has to be a way to protect fundamental rights.

Dr. Villalta established that, in Central America, headquarters agreements are usually used as relevant guidance on immunities. She mentioned that in the absence of agreements, the situation is handled mostly on a case-by-case basis and that guiding principles could be useful in the practices of States.

Dr. Hernández García noted that in many aspects he concurs with the comments of the other Members and he proposed to submit a report at the next Committee meeting

During the 88th Regular Session of the Inter-American Juridical Committee (Washington, D.C., April, 2016), the Rapporteur for the Topic, Dr. Hernández García explained that this report was the result of an analysis of 15 international conventions, and took into consideration, *inter alia*, the constitution of international organizations, headquarter agreements and specific immunity-related treaties. In addition, he commented that the *rationale* underlying the report was to look for general principles to guide international organizations and countries in respect of the former's international immunities.

He said that the purpose of the study was to analyze the scope and limits of the immunities

The study enabled him to note the following common features relating to immunity in the cases reviewed: jurisdictional immunity, immunity from execution, personal inviolability, inviolability of archives, communication facility, tax exemption, migration facilities, monetary and exchange facilities, customs facilities, occupational liability in local recruitment, and waivers of immunity.

With respect to legal capacity, what the treaties had in common was that they refer to capacity to hire/enter into contracts, acquire real estate, and initiate judicial proceedings.

As regards immunity to jurisdiction, there were various degrees depending on the recipients. Generally speaking, there was immunity to any kind of judicial proceeding. A different instrument was the Agreement Establishing the Inter-American Development Bank which extends that immunity to the territory of all the Member States.

Representative of International Organizations were on a pair with diplomats when it comes to immunities depending on their rank. Higher-ranking officials, such as Secretaries General and Directors General were guaranteed equivalent immunity as diplomats, whereas other staffs of international organizations were granted only functional immunity.

The inviolability of offices, archives and communication facilities was considered absolute. There were also tax exemptions and customs facilities.

In conclusion, immunities are absolute, with restrictions in only very exceptional cases. One example was payment for public utilities, although there were tax exemptions.

All the treaties provided for the option to waive immunities. One recurrent exception involved restrictions with respect to the immunities of nationals of the territory in which the Headquarters is located, they may not enjoy the same immunities are foreign nationals.

Another important point was that waiving jurisdictional immunity does not *ipso facto* imply waiving immunity from execution. Some treaties explicitly required a specific waiver with respect to execution.

Finally, some agreements contained provisions guaranteeing access to justice. Here there were two approaches. In one of them, there were rules requiring in-house procedures within the organization that enable someone who feels wronged to defend himself/herself. In the other, there were provisions allowing for resorting to domestic laws.

The Rapporteur said that the next step would be to analyze further treaties and jurisprudence regarding this subject in the countries of the region.

Dr. Salinas urged the Rapporteur to focus his study on practical aspects of limiting the immunities of international organizations. He explained that as a legal advisor to the Ministry of Foreign Affairs of Chile, the most common problem he encountered was related to labor rights and mechanisms for settlement of disputes. He pointed out that various national courts have developed case law on the subject, and suggested that national jurisprudence on the subject be studied. He also noted that there are differences in immunities of States related to the nature of commercial transactions. In some cases, certain commercial transactions are recognized as intrinsic to the functions of international organizations, and so would be considered as administrative operations and not commercial transactions. In this area, the traditional limitations on states' immunities are not equally applicable.

Dr. Correa noted how complex the issue was. She also commented on the existence of a certain consensus among States on extending facilities and immunities on fiscal aspects. She pointed out the example of Colombia where the courts limmited immunity in areas of both tax and labor matters.

Dr. Pichardo underlined that this is a topic of interest to everyone working in the foreign ministries of governments. He recalled that the greatest problem occurred in labor matters. He suggested that the Rapporteur take into account the UN Draft Articles on the Responsibility of International Organizations.

Dr. Collot expressed doubts regarding the nature of some of the organizations referred to in the report.

Dr. Hernández García thanked the members for their comments, and especially Dr. Pichardo, for bringing up a subject that was not included in his report. Although he was of the opinion that the issue of responsibility was not part of the mandate, it is an aspect that could be taken into account, because it can give rise to use of immunity in legal claims.

He added that the treaties analyzed did not leave room to consider extracontractual responsibility of international organizations. The analysis would consist in review of the regulations of selected organizations in the region, with a view to continuing the study of national jurisprudence. He also agreed with Dr. Correa that disputes today are not confined to labor issues, and with Dr. Salinas regarding the distinction drawn between internal administrative operations and commercial acts.

He mentioned the difficulties many countries have in striking a balance between the immunities of international organizations and the rights of victims to have access to justice and reparations.

In response, Dr. Collot explained that he selected international organizations that are important in the region.

The Vice-Chairman observed that in matters related to the immunities of international organizations, unlike immunities of states, there is usually an objective element in the form of the headquarters agreement that indicates the scope of said immunities.

He mentioned two national judgments in which jurisdiction were assumed. The first had to do with a case in Brazil on labor issues, in which the country's Supreme Court assumed jurisdiction to avoid denial of justice. The second one was a case in Uruguay in which national legal actions against an international organization were allowed in order to avoid denial of justice, as in the Brazilian case. In this regard, he asked the Rapporteur if there were mechanisms in the United Nations to enable possible victims to file claims for reparations.

Dr. Salinas explained that in the case of the alleged cholera victims in Haiti, they were not covered by the United Nations tribunal, which deals specifically with labor matters. Going back to the issue of international organizations analyzed by the Rapporteur, he supported his explanation related to the group of organizations selected for the study, since they were all international by nature.

In concluding the discussion on the issue, the Rapporteur was asked to pursue his study of the immunities of international organizations, with an emphasis on jurisprudence in the OAS Member States.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, October 2016), the topic was not discussed.

At the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the thematic Rapporteur, Dr. Joel Hernández, presented the third report on the subject, document CJI/doc.528/17. He recalled that his first report had outlined the three main reasons for addressing immunity of international organizations separately from immunity of States, and that he had proposed that the Committee should draft a set of "General Principles of International Law in the Americas with respect to the Jurisdictional Immunity of International Organizations." In order to do so, he had suggested an examination of relevant treaties and host agreements, which had been presented in his second report, and a review of case law, which was what he was presenting in this third report.

Dr. Hernández then turned to the Annex to his report to explain the methodology behind the preparation of the table of cases. He had found the case law to be abundant and he had drawn on the judicial decisions from 18 OAS Member States. The Rapporteur explained that it represented a collection of the raw material from which the principles could be developed. Two common elements had emerged from the first group of decisions he analyzed: immunity from suit and exceptions or limits to immunity. Dr. Hernández concluded his report by inviting the other Committee members to provide him with any other cases to be included in the collection.

The Chair thanked the Rapporteur for his thorough research and noted that the task of compiling jurisprudence from so many countries was not easy. He further noted that the decision was made by the Committee to separate the topic of immunity into that of States and that of international organizations, because the scope of each type of immunity is very different under international law, at least, it is in theory. However, the case law has shown that this distinction was not always clear, especially with regard to the topic of *juri gestionis*. Immunity of international organizations was found to be necessary to enable these entities to fulfill the purposes for which they have been created. The Chair also mentioned the emerging trend with respect to the settlement of disputes.

Dr. Mata Prates pointed out that one of the key differences between the two—immunity of States and of international organizations–was that international organizations would have entered into a headquarters agreement with the host State, establishing immunity.

Dr. Correa offered a perspective using an example from Colombia, which in her view was common to most States. Even though the judge would speak in favor of the jurisdictional immunity of a State or an international organization, when public assets have been damaged by an

international organization, the local court will limit or suspend immunity. This is also what happens with regard to fundamental rights, such as the right to petition and in labor law issues.

Dr. Hernández noted that the decision to differentiate the two—immunity of States from immunity of international organizations—had originally been deemed necessary for methodological purposes, but it could be discarded. The importance of this exercise, he said, would be to extract principles and find solutions. He explained that since it was impossible to conduct an exhaustive study, he had focused on decisions of higher courts. Thus far, it would appear that 1) jurisdiction is restricted by the fundamental rights of individuals and by labor laws and, 2) immunity will be recognized provided that there is an alternative way in place to resolve the dispute. It was his hope that this would have a practical application.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the thematic Rapporteur, Dr. Joel Hernández, presented the fourth report on the subject, document CJI/doc.545/17, and then asked the plenary to join him with its comments. He explained the background to the topic, the initial report of which included a comparative analysis of national legislation, treaties establishing intergovernmental organizations, headquarters agreements, and legal precedent-setting decisions. He then discussed this new document, the purpose of which is to ascertain the scope of immunity, the existence of exceptions or limits set forth in treaties, the scope of the exceptions in relation to commercial activities, the scope of the principle of respect for public order and recourse available to third parties to remedy violations.

The study reached two conclusions:

- It was established that immunity, as defined in the terms of the treaties creating it, is handled on a case-by-case basis. In fact, headquarter agreements establish specific terms that may be general as well as *ad hoc*.
- No international practice can be identified in order to produce an instrument with general principles of international law, due to the case-by-case treatment of immunity of international organizations.

He then proposed preparing a "practical guide to the application of jurisdictional immunity of international organizations," which sets forth guidelines regarding solutions provided by treaties or courts, to serve as a tool to operators of justice or executive officers, in addition to guiding States on future headquarter agreements.

The practical guide establishes twelve guidelines, each followed by the Rapporteur's explanatory notes about the reasons behind the guidelines. The work was limited to jurisdictional immunity of international organizations and did not include immunity of international employees or permanent representatives of Member States. The guide should be viewed as a starting point for development in terms of the practice of international organizations.

As for the course of action, the Rapporteur urged members to submit their comments and he then proposed to circulate the draft to the ministries of foreign affairs and offices of legal counsel in order to set up a feedback channel prior to its approval within the Committee.

The first guideline: consensus between the Member States as a source of immunity of international organizations. Applicable law is not the result of a customary norm, but of the will of the States, who decide to grant said immunity to the organizations, mostly through treaties. Therefore, once said instrument is approved, they are binding on States.

The second guideline: objective of international immunity. It can be ascertained from treaties establishing intergovernmental organizations that immunity is granted in order to make their object and purpose, their functional nature possible and not to benefit any individual. On this score, he cited Article 133 of the OAS Charter.

The third guideline: scope of immunity. The property and assets of international organizations are immune from acts carried out in the execution of their object and purpose, except when expressly waived. There is disagreement as to the determination of the absolute or relative

nature thereof. This immunity faces two limits: it is limited to acts carried out in the execution of its object and purpose, and when the organization waives its immunity.

The fourth guideline: limits on jurisdictional immunity. Organizations lack immunity from proceedings arising from acts of private law, except when the immunity is necessary to preserve autonomy. A distinction should be drawn from strictly commercial acts of private law, carried out as any other individual would do in the market (a context not covered by the immunity). Furthermore, under legal precedent-setting court decisions, immunity has been granted for acts linked to the execution of the purpose of the organization, such as contracting of employees (case of Broadbent *v.* OAS). In the case of the victims of the cholera epidemic in Haiti, a US appeals court recognized immunity from acts carried out in performance of their mandates. The threshold set for cases in dispute in the realm of private law is the criterion of necessity, meaning that it is necessary for the central function of the Organization (case of *Amaratunga*).

The fifth guideline: private law dispute resolution mechanism. International organizations should provide for the means for the resolution of disputes of international private law in order to guarantee access to justice for individual parties to any controversy. Generally speaking, at the UN and OAS, these mechanisms are built into administrative labor tribunals; however, in both instances remedies are only accessible to officials who have immunity.

The sixth guideline: characteristics of dispute resolution mechanisms. The mechanisms should be adequate and effective. The European Court of Human Rights has set three requirements: immunity must not restrict the right to due process, limitations on immunity must pursue a legitimate purpose and there must be a reasonable relationship of proportionality between the means and ends achieved.

The seventh guideline: Lack of a previously established dispute resolution mechanism. When there is no mechanism in place, the practice is to cover these gaps through insurance.

The eighth guideline: cooperation with the host State in administration of justice. Organizations and their employees should facilitate adequate administration of justice, ensure the enforcement of the law and prevent abuses. Both the UN and the OAS Charters have provisions on the obligation to cooperate with local authorities, though limited to acts of their employees.

The ninth guideline: appearance before domestic courts. Despite their immunity, international organizations must appear before domestic courts. In this regard, the Rapporteur ascertained that in the case of Haiti, the United Nations did not appear when it was summoned before the courts and that this failure to appear runs counter to the general obligation to cooperate with domestic authorities.

The tenth guideline: immunity against enforcement of judgments. Both the organization and its property and assets are protected against measures enforcing judgments.

The eleventh guideline: waiver of immunity of jurisdiction. Waiver of immunity of jurisdiction does not cover *ipso facto* waiver of immunity from enforcement of judgments. However, the waiver must be expressly made.

The twelfth guideline: Drafting of a convention. It is not deemed necessary for the OAS to consider the drafting of a legally binding instrument, and in this regard, the case-by-case approach of the issue supports the preparation of a guide for the benefit of the administrative and judicial bodies of the State.

Dr. João Clemente Baena Soares expressed his gratitude for the work of Dr. Joel Hernández, and agreed with the work methodology explained by the Rapporteur. He made remarks on the importance of headquarter agreements and that, among other duties, he had been in charge of drafting the OAS's agreement, because there was no headquarters agreement in force at that time.

Dr. Duncan Hollis expressed his appreciation for the quality and summary nature of the report and endorsed the approach of presenting guidelines in light of the case-by-case nature of the topic. He invited the Rapporteur to consider maybe including the topic of privileges, which although it has not been the subject of many disputes in this sphere, it has been so in other spheres,

citing in this regard developments on the subject of archives in the sphere of cybersecurity where a section on privileges is presented in terms of potential violations that could be committed.

He noted that guideline two in the English version must refer to the object; while, in guideline three, the situation of an absence of immunity should be addressed, making it clear when such a right is not included or is waived, but it must be clearly established and not be deduced based on the existing situation. As for guideline five, liability must be established taking into account the close connection between the fourth and fifth guidelines. Regarding the eighth and part of the ninth guidelines, the verb tense must be made consistent with the rest of the text, unless the intent is to express mandatory nature. Lastly, in the ninth guideline, the situation needs to be clarified with respect to the cases in which it appears that it has been determined or there exists a clear appearance of immunity.

Dr. Alix Richard expressed his gratitude for the work of the Rapporteur. He explained a personal experience in which it was his job to defend the OAS in a case of compensation for individuals who worked on an Organization project in Haiti. He explained that 10,000 people had died of cholera in Haiti. While at first the UN disputed any recognition of that fact, in the end the Secretary General of the global organization recognized moral responsibility, but the fundamental problem is impunity, inasmuch as no deal has been struck on fair compensation for the victims and for the country. He suggested trying to find solutions that take into account these types of situations.

Dr. Carlos Mata Prates congratulated the Rapporteur for his report, and concurred with his opinion on the way forward, which would not entail a binding legal instrument. As for the guidelines, he noted recommendations of different types that should be standardized. Therefore, he requested that a distinction be drawn between situations or cases where there is or is not a headquarters agreement in effect. The third and fourth guidelines have the same support behind them and, therefore, he proposed merging them into a single guideline. He also suggested clarifying the limits pertaining to acts of private law and *iure gestioni*. As for the fifth guideline, the situation experienced in Haiti calls for instituting a tribunal or arbitral proceeding for dispute settlement (made up of two independent persons) in order to avoid conflicts with a principle of human rights and facilitate a space for the resolution of a claim in an impartial forum. It also applies to persons who are not employees. He asked to find a more accurate term with regard to the threshold of necessity in private law disputes. He also urged bringing the sixth and seventh guidelines closer together. The eighth guideline is about an obligation to cooperate and not an act of courtesy, he said. Lastly, in the ninth guideline, it should not be confined to appearing, but should include as well the effect, which is to either accept or reject jurisdiction.

Dr. Ruth Correa recognized the work of Dr. Joel Hernández. As for the guidelines, she made very specific suggestions, such as establishing tribunals and respecting the criterion of necessity in establishing them. For this purpose, she suggested deciding what acts could be heard by the domestic jurisdiction in each State. Additionally, she proposed reference to the criterion of accessibility. As regards guideline nine on the need for the organization to appear, she requested that it should only be required to allege lack of jurisdiction based on the immunity enjoyed by it. To her understanding, a ruling by the judge on competence is essential. Therefore, she recommended that an appearance be included, which would involve making the case for immunity of jurisdiction on its own behalf. Lastly, with relation to reparation for damages to the victims, some reference to liability that States may have should be included. She cited in this regard precedents in which the State of Colombia was found liable for being the entity that decided to establish the immunity.

Dr. Elizabeth Villalta thanked the Rapporteur for the practical nature of his work on the proposed guidelines. Additionally, she noted that not all States are parties to the conventions on the subject matter, such as the 1946 London Protocol.

The Chair made comments and congratulated the Rapporteur for his excellent proposal, which he said provides a fine illustration of what can be expected of a guide and of the

Committee's codifying role, in support of the development of international law on the subject matter. He singled out guidelines seven, eight, and nine. Specifically, he found it essential to define the type of immunity through a link to the particular treaty and the establishment of its object and purpose, so that it is determined by customary law. As for the distinction between an act of *iure imperii* (act by right of dominion) and an act of *iure gestione*, he thought that it should not be subjected to the criterion of necessity, but instead based on fulfillment of the object and purpose of the action. He expressed his support for the opinion of Dr. Hollis about the ninth guideline, in light of the fact that simply appearing does not mean that immunity is forfeited. He also noticed a connection between guideline four and guidelines seven, eight, and nine, when no dispute resolution exists. Likewise, he supported the idea of including the topic of privileges.

The thematic Rapporteur thanked everyone for their comments, which allow him to think deeper about the content and he cited, in this regard, the crosscutting nature involved in the object and purpose of acting. He also expressed agreement with the analogy of *imperii and gestioni*, and with placing more emphasis on the topic of access to justice. He consulted the plenary as to whether or not he should circulate the new version that he will draft based on the comments presented. In response, the Chairman replied in the affirmative. On October 13, 2017, the Rapporteur on the subject presented a revised version of his report, titled "Immunity of international organizations: document for comments," which features eleven guidelines, based on the premise that the Guide will not be binding and on the intention of reflecting the practices of States and international organizations on this subject matter. Accordingly, comments were requested from the offices of legal counsel of the ministries of foreign affairs of the OAS Member States, through the permanent representatives to the OAS, as well as certain international organizations. On October 27, 2017, the Technical Secretariat of the Committee sent out the request for comments or suggestions, the responses to which are expected by January 31, 2018.

The revised document submitted by Dr. Hernández García in October 2017 is included below:

CJI/doc.545/17 rev.1

IMMUNITIES OF INTERNATIONAL ORGANIZATIONS:
DOCUMENT FOR COMMENTS

(Presented by Dr. Joel Hernández García)

1. Background

At the 86th regular session, the Juridical Committee decided to begin an examination of the immunities of international organizations. The study was entrusted to Dr. Joel Hernández García, member of the Juridical Committee and its current Vice Chair.

The initial objective of the Rapporteurship was to draft an instrument containing general principles of international law in the Americas with respect to the jurisdictional immunities of international organizations, however, the rapporteur concluded the relevance of proposing a **Practical application guide on the jurisdictional immunities of international organizations**. In response to the mandate received by the Committee, the Rapporteur submitted three reports[1] that explain the development of the Guide.

With a view to preparing this instrument, the Rapporteur has examined the following sources of law: national laws (in the countries that have enacted them);[2] the treaties

[1] Joel Hernández, Immunities of International Organizations, document CJI/doc.486/15 of July 30, 2015.

[2] Department of International Law, Immunities of International Organizations, document DDI/doc.5/15 of July 24, 2015.

establishing the bodies of the inter-American system, the headquarters agreements in force,[3] and case law.[4]

2. Proposed practical application guide on the jurisdictional immunities of international organizations

The examination of the aforementioned instruments yielded two conclusions.

First, the jurisdictional immunities of international organizations are treated on a case by case basis.

All of the organizations are subject to founding treaties that both establish them and enshrine the decision of the Member States to endow them with the means with which to perform their functions. These founding treaties establish legal relationships among the international organizations and the Member States and create a general legal framework for their respective activities.

In some cases, international organizations enter into headquarters agreements with the host State to specifically define the legal relationship in the country where they are established. The analysis undertaken demonstrates that this second type of treaty makes it possible to set specific conditions for the body's operation in the territory of the host State according to the needs of the organization and the host State's potential for extending immunities, prerogatives, and facilities. Those headquarters agreements are in turn based on the administrative measures and laws of the host State.

Although these instruments include elements common to all types of international organizations, they also contain characteristics specific to each given organization.

Given that the immunities of international organizations are dealt with on a case by case basis, the second conclusion derived from the analysis is that it is impossible, for now, to identify a consistent international practice that would allow for the creation of an instrument with general principles of international law applicable to international organizations in the Americas.

Nevertheless, we can extract the best practices of States and international organizations as well as of national and international courts in order to address the jurisdictional immunities of organizations in a way that allows for them to function and to meet minimum legal standards in the territories where they conduct their activities.

In view of the above, the Rapporteur considers that it may be useful for OAS Member States to draft a **Practical application guide on the jurisdictional immunities of international organizations** with recommendations for handling specific aspects of the jurisdictional immunities of international organizations.

3. Characteristics and scope of the practical application guide on the jurisdictional immunities of international organizations

The draft Guide, presented as an annex, contains practical guidelines accompanied by explanatory notes by the Rapporteur. In addition, it identifies the source of law that supports the guidelines, whether it is a treaty, judicial decision, or provision of national law.

With respect to its content, the draft Guide is limited to the jurisdictional immunities of international organizations and does not include other components of diplomatic law. In other words, it does not consider the privileges, courtesies, and faculties that the States may grant to international organizations unilaterally or by treaty provision. This exclusion is based on the fact that the practice examined does not reflect differences or disputes in the application of

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[3] The second report, presented at the 89th regular session (CJI/doc.499/16), examined 15 international instruments including establishing treaties, privileges and immunities agreements, and the headquarters agreements of regional and subregional bodies.

[4] The third report, presented at the 90th session, listed court decisions from OAS Member States that had adjudicated cases related to the immunities of international bodies. The research shows that such decisions have been issued in 18 States: Argentina, Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, the United States of America, Guatemala, Mexico, Panama, Paraguay, Peru, the Dominican Republic, Trinidad and Tobago, Uruguay, and Venezuela.

privileges such as the inviolability of premises, the inviolability of archives, communications facility, customs facilities, and tax exemptions.

The proposed Guide also does not address the jurisdictional immunities of the staff members of international organizations or the representatives of Member States. With regard to the former, the immunity conferred is functional in nature and the acts they perform in the course of their duties are protected from undue interference. Secretaries General and representatives of the States are treated as diplomatic agents for purposes of privileges and immunities.

In general, the proposed Guide should be seen as a starting point for ongoing consideration as the practice of international organizations is developed.

This Rapporteurship is of the opinion that the conditions do not exist at this time for the Organization of American States to consider drafting a legally binding international instrument on the jurisdictional immunities of international organizations.

The elements gathered at this point make it possible to confirm that there is no standard treatment within the Member States with respect to the immunities of international organizations. The practice of the States is regulated through headquarters agreements on their relationships with the international organizations residing in their territory.

The case by case approach to this matter leads us to conclude, in addition, that the administrative and judicial bodies of the States would benefit from being familiar with the practice of States that reflects and fosters an emerging international custom, in order to guide their own decisions.

It may be useful for the elements of this practical Guide to be incorporated into headquarters agreements, thereby resolving organizations' situations of conflicts in advance.[5]

4. Course of action

During its 91st regular session, the Committee reviewed the draft Guide and decided to circulate the text among interested parties for their comments.

Comments from the legal offices of OAS Member State foreign ministries, and from international organizations, to enrich the attached proposal would be very helpful. Comments and suggestions sent to the Department of International Law of the OAS Secretariat for Legal Affairs before January 31, 2018, will be very gratefully received.

Once such comments are in hand, the Juridical Committee will study a revised version of the Guide for later submission to the OAS policymaking bodies.

It should be emphasized that the Guide will be nonbinding in nature. It is meant solely as a reference document reflecting the practices of states and international organizations in this area. The more the instrument reflects international practice, the more useful it will be to its target audience.

ANNEX

PRACTICAL APPLICATION GUIDE ON THE JURISDICTIONAL IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

(Draft)

Guideline 1

Agreement of the Member States is the source of the jurisdictional immunities of international organizations

The jurisdictional immunities of international organizations are derived from the intent of their Member States, expressed in constituent treaties or agreements on privileges and immunities with regard to the legal relationship between that organization and its members in

[5] The International Law Commission of the United Nations attempted unsuccessfully to draft a general instrument on the privileges and immunities of international organizations. See: http://legal.un.org/ilc/summaries/5_2.shtml.

headquarters agreements governing the legal relationship with the State that hosts the international organization in its territory.

Unlike the immunities of States, the applicable law is not the result of the evolution of a customary rule later codified in international law instruments. The law applicable to international organizations is the result of the agreement of the members of the organization that decide to concede immunity in order to give it operational capacity.

Rapporteur's Notes

By virtue of the principle of *par in parem non habet imperium*, States enjoy immunity before the courts of other States. Pursuant to that principle, States cannot be defendants in court cases. This principle originated as a corollary to the principle of equality between States, and gave rise to the absolute immunity of the State.

The law applicable to international organizations took a different evolutionary course. As a general rule, the constituent instrument is the treaty in which each Member State sovereignly recognizes and grants it legal personality for the accomplishment of its objectives. In addition, most constituent treaties establish and regulate—although very generally—the prerogatives of the international organization in question. Some organizations draft agreements on privileges and immunities to this end.

Additionally, the specific relationship between the international organization and the State where it is located is governed by headquarters agreements that are negotiated for every activity of the organization, or on an *ad hoc* basis to regulate some specific activity of the organization in the territory of one of its Member States.

There is no treaty that codifies the immunities of international organizations at the global or regional level; rather, each organization enters into a headquarters agreement with each State in which it sets up an office. Thus, each State that accredits an international organization in its territory sovereignly recognizes it and grants diverse rights and obligations, bearing in mind each organization's purposes and objectives. Some States have adopted national laws to regulate the activity of the international organization operating in their territory, lending greater certainty to its legal relationship with those bodies.

The immunities of international organizations are therefore dealt with on a case by case basis. The organizations assert before the national courts the immunities recognized in the treaties entered into with the receiving State or provided for in its national laws.

As a general rule, a State cannot subject its acts to the national courts of another State, because there is a legal relationship between equals. In the case of the immunities of international organizations, a legal relationship is established whereby that system is subservient to the intent of the Member States contained in treaties or national laws.[6]

Guideline 2

Objective of jurisdictional immunities

Immunities are granted to international organizations to enable them to accomplish their objective and purpose. Immunities are eminently functional in nature and no benefit is granted to any person.

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[6] See Judgment 305:2150. Supreme Court of Justice of Argentina, Cabrera, *Washington Julio Efraín v. Comisión Técnica Mixta de Salto Grande*. (December 5, 1983). "Inter-governmental international organizations are now recognized as 'subjects' of international law. That status, however, emanates or is derived from the common intent of their Member States, based on which organizations enjoy or do not enjoy the privilege of jurisdictional immunity in accordance with the provisions of the respective constituent treaties and, if appropriate, the pertinent headquarters agreements (the latter being entered into by the international organization and the State in whose territory the organization's bodies are located and operate)."

Rapporteur's Notes

The constituent treaty of an international organization results in the creation of a legal entity with legal personality and its own assets. By establishing that "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes," Article 104 of the Charter of the United Nations established a fundamental criterion for every international organization. Privileges and immunities are granted in order for them to be able to carry out the functions for which they were created. Thus, in Article 105(1), the Charter States: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

In the inter-American sphere, Article 133 of the Charter of the Organization of American States similarly establishes that the OAS "shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes."[7]

The Agreement Establishing the Inter-American Development Bank states that, "To enable the Bank to fulfill its purpose and the functions with which it is entrusted, the status, immunities, and privileges set forth in this article shall be to the Bank in the territories of each member."[8]

In sum, the immunities and privileges are eminently functional in nature and are granted in order for the organization to be able to accomplish its object and purpose.

Guideline 3

Scope of jurisdictional immunities

International organizations, their property, and assets enjoy immunity from all judicial proceedings concerning acts carried out in the pursuit of their object and purpose, to the extent provided by applicable agreements, except in cases in which the organization expressly waives that immunity.

Rapporteur's Notes

The texts examined grant jurisdictional immunity to international bodies, their property and assets, the representatives of the Member States, and the staff of the organization's secretariat.

Although functional, this immunity is absolute with respect to acts carried out to accomplish the organization's objective and purpose. The statutes of every organization establish the acts related to the objectives of the organization and, therefore, covered by immunity.

The ultimate purpose of that jurisdictional immunity is to ensure the organization's independence and prevent undue influence in the performance of its mandate. Otherwise, an organization would be subject to all types of lawsuits that would make its work impossible. In the case of *Amaratunga v. Northwest Atlantic Fisheries Organization*, the Supreme Court of Canada held that, without immunity, an international organization would be vulnerable to interference in its operations by the receiving State and its courts.[9]

Jurisdictional immunity also extends to the country offices of the Member States of the international body. Generally, the representatives of the Member States enjoy the same degree of jurisdictional immunity as that to which diplomatic agents are entitled under international law.

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[7] Charter of the Organization of American States, signed in Bogotá on April 30, 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.

[8] Agreement establishing the Inter-American Development Bank (IDB), adopted in Washington D.C. on April 8, 1959, Article XI, Section 1.

[9] Docket 34501. Supreme Court of Canada. *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

With respect to the personnel of the General Secretariat of an international organization, immunity varies according to the administrative level of the staff member. For instance, the Secretary General and the Assistant Secretary General of the OAS enjoy privileges and immunities equivalent to those granted to diplomatic agents.[10] For the rest of the staff, jurisdictional immunity is a more limited nature. In other words, staff members enjoy immunity from all legal proceedings concerning acts carried out in their official capacity.

Therefore, jurisdictional immunity is limited by two factors. First, that immunity is limited to acts performed to accomplish the organization's object and purpose—that is, acts of *iure imperii.* As established in the section below, it is not applicable to non-sovereign acts, or acts *iure gestionis*. The second limit arises in specific situations when the international organization waives its immunity.[11]

Guideline 4

Limits to jurisdictional immunities

International organizations lack jurisdictional immunity from actions arising from non-sovereign acts, or acts *iure gestionis*, including employment disputes, except when said immunity is necessary to preserve the autonomy of the organization.

Rapporteur's Notes

In the case of both States and international organizations, customary law excludes non-sovereign acts (acts *iure gestionis*) from jurisdictional immunity. Nevertheless, two aspects must be resolved. First, we must determine private law acts that should be excluded from the scope of immunity. Second, in order to make that determination we must specify the threshold required to exclude non-sovereign acts from the scope of immunity.

In the first case, we must distinguish strictly commercial non-sovereign acts that might be performed by international organization like any other actor in the market. This category encompasses the procurement of goods and services, including the hiring of employees that provide support to the international organization in the receiving State.

The Agreement Establishing the Inter-American Development Bank allows for legal actions to be brought against the Bank under certain circumstances.[12] If the Bank's purpose is to provide financing to Member States for development projects, the acts are commercial in nature. Immunity, then, should be strictly functional and allow for legal actions in certain cases.

On the other hand, the practice has excluded from this limitation those non-sovereign acts that are related to the accomplishment of the organization's aim. In the case of *Broadbent v. Organization of American States,* the U.S. Court of Appeals for the District of Columbia held that the hiring of civil service employees by the OAS is not a commercial activity and, therefore, covered by immunity for purposes of preventing undue interference.[13]

The case law has also granted immunity to international organizations in tort cases. Even though the payment of damages for acts caused by an international organization pursuant to its mandate can be a civil action, in the case of *Georges v. United Nations*, the U.S. Court of Appeals recognized the jurisdictional immunity of the United Nations, dismissing the claim

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[10]. Agreement on Privileges and Immunities of the Organization of American States, adopted in Washington on May 15, 1949, Article 7, first paragraph and clause (g); and Article 8.

[11]. See Guideline 11 *infra.*

[12]. Ibíd. "Solamente se podrán entablar acciones judiciales contra el Banco ante un tribunal de jurisdicción competente en los territorios de un país miembro donde el Banco tuviese establecida alguna oficina, o donde hubiese designado agente o apoderado con facultad para aceptar el emplazamiento o la notificación de una demanda judicial, o donde hubiese emitido o garantizado valores." Artículo IX, Sección 3, párrafo primero.

[13].*Broadbent v. Organization of American States*, United States Court of Appeals for the District of Columbia Circuit, January 8, 1980. 628 Fed.Rptr.2d 27 (1980).

filed by victims of the cholera epidemic attributed to the MINUSTAH "blue helmets" in Haiti in 2010.[14]

In order to support jurisdictional immunity in disputes governed by private law, the threshold of "necessity" must be met. In the case of *Amaratunga*, the Canadian Court of Appeals found that immunity is "necessary" to preserve the autonomy of the organization. In the context of employment disputes, to the extent that employee's tasks are closer to the central function of the organization, the more likely it is that the organization's autonomy is at stake, and therefore, immunity is generally required.[15]

This criterion was expanded by the Supreme Court of Canada to hold that the Northwest Atlantic Fisheries Organization must be protected from "undue interference," which is determined on a case by case basis. The Court held that the NAFO must be authorized to manage its employees, especially its senior staff, in order to prevent "undue interference" in its operations.[16/]

Undoubtedly, employment disputes are of central concern to the Member States. The practice examined demonstrates a tendency to limit immunity in those cases, provided that they involve the hiring of personnel as part of a commercial activity.

Immunity is maintained in cases involving the organization's civil service staff, or those who hold positions central to the mandate of the organization. As examined in Guideline 5 *infra*, the organization should in any case provide dispute resolution mechanisms so that the individual is not left defenseless.

Guideline 5

Dispute resolution mechanisms in private law

International organizations should provide means of dispute resolution under private law in order to guarantee access to justice to individuals involved in a controversy of that nature.

Rapporteur's Notes

The long-standing practice in organizations is to establish a dispute resolution mechanism to handle claims governed by private law. The UN[17] and OAS[18] agreements on privileges and immunities have provided dispute resolution mechanisms to resolve private law disputes or disputes involving employees that enjoy immunity. Administrative courts have been established in both cases.

This solution reinforces the functional nature of the immunities that international organizations enjoy. Furthermore, it makes it possible to strike a balance between immunities and the right to access to justice of private individuals who cannot avail themselves of the national courts.

A lacuna, however, in the UN and OAS agreements on privileges and immunities is that the availability of dispute resolution remedies is limited to staff members who enjoy immunity. A different solution in other organizations has been to establish the general obligation to have private law dispute resolution mechanisms.

Guideline 6

Characteristics of dispute resolution mechanisms

Dispute resolution mechanisms established by international organizations to resolve private law disputes must be adequate and effective.

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[14].Georges *v.* United Nations, United States Court of Appeals of the Second Circuit, On Appeal from the United States District Court for the Southern District of New York, August 18, 2016.

[15] Docket CA 343395, Nova Scotia Court of Appeal, *Northwest Atlantic Fisheries Organization v. Amaratunga*, 23, 08, 2011.

[16.] Docket 34501. Supreme Court of Canada. *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

[17] Convention on the Privileges and Immunities of the United Nations of 13 February 1946, Article VIII, section 29.

[18.]Ibid, note 10 *supra*, Article 12.

Rapporteur's Notes

In the case of *Waite and Kennedy v. Germany*,[19] the European Court of Human Rights held that immunity depends on the availability of adequate and effective remedies. The European Court has specified three requirements for maintaining immunity: (i) immunity must not restrict or diminish the right to due process; (ii) the limitations to immunity must pursue a legitimate aim; (iii) there must be a reasonable relationship of proportionality between the means used and the aim accomplished.

The functional nature of immunities requires that individuals' right of access to justice be preserved. Therefore, the mere obligation to establish dispute resolution mechanisms is insufficient; these mechanisms must be adequate and effective.

Guideline 7

Absence of previously established dispute resolution mechanisms

International organizations should provide alternative means composed of impartial people to handle private law claims in the event that their statutes do not provide for dispute resolution mechanisms.

Rapporteur's Notes

There are some organization-founding instruments, and some agreements on privileges and immunities, that do not provide dispute resolution mechanisms, or that do so only in a limited way. This situation should not exempt such organizations from the general obligation to abide by due process when private parties lodge a claim under private law.

Without prejudice to the immunity of organizations, one good practice has been to provide alternative dispute resolution when an organization does not have specific mechanisms. For example, organizations could reach friendly settlement agreements, or could purchase insurance to cover contingencies.

Guideline 8

Cooperation with the receiving State in the administration of justice

Organizations and their staff members shall cooperate at all times with the Member States to facilitate the proper administration of justice, guaranteeing the observance of mandatory rules and preventing the occurrence of any abuse in the enjoyment of immunities, exemptions, and privileges.

Rapporteur's Notes

A consistent practice in the agreements governing international organizations is their obligation to cooperate with local authorities in respect for national laws and administrative measures. This principle, borrowed from the immunities of States, allows for a balance between such obligations and jurisdictional immunities for purposes of maintaining the strictly functional nature of immunities.

Section 21 of the Convention on the Privileges and Immunities of the United Nations limits that obligation of the United Nations to cooperate with respect to the acts of its officials, precisely to prevent abuses in connection with the enjoyment of immunities. Similarly, in the case of the OAS, Article 11 of its Agreement on Privileges and Immunities establishes the obligation of the Pan American Union to cooperate with authorities to prevent abuses by their personnel.

An obligation to cooperate with local authorities should be general and not limited to the acts of staff members. The practice followed by Mexico in its headquarters agreements is to include that obligation to cooperate generally with local authorities.[20]

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[19]. Application No. 26083/94, European Commission of Human Rights, 2 December 1997.

[20]. e.g., Agreement between the United Mexican States and the International Bank for Reconstruction and Development (IRDB) for the establishment of an office in Mexico City. Mexico City, July 31, 1987, Article 13.

Guideline 9

Appearance before national courts

Without prejudice to their jurisdictional immunity, international organizations must appear before national courts to assert their immunity or present a defense.

Rapporteur's Notes

An analysis of the case of *Georges v. United Nations*[21] and other cases shows a consistent practice by international organization of refusing to appear in court when summonsed, invoking jurisdictional immunity. In the opinion of the Rapporteur, a best practice would be for the international organization to be obligated to appear in its own interest.

This appearance would be consistent with the general obligation to *cooperate with national authorities as developed in Guideline 8,* supra, and it would provide the opportunity for the organization to assert its immunity.

Guideline 10

Immunity from enforcement

International organizations, their property, and assets are protected from enforcement measures.

Rapporteur's Notes

Immunity from enforcement is a recognized practice. Even in disputes governed by private law that reach the national courts, immunity from enforcement is fully accepted. In the case of the UN and the OAS, immunity from enforcement is provided for expressly in their agreements on privileges and immunities.[22]

Guideline 11

Waiver of jurisdictional immunity

International organizations should consider the waiver of their jurisdictional immunity or that of their employees a corollary to their obligation to cooperate with the competent authorities of Member States. That waiver of jurisdictional immunity does not include *ipso facto* the waiver of immunity from enforcement.

Rapporteur's Notes

The waiver of immunity is a remedy available to organizations to prevent immunity from preventing justice in certain cases. The waiver maintains the functional nature of the immunities and is a corollary to their obligation to cooperate with the competent authorities of the Member States.

One constant theme in cases involving the waiver of jurisdictional immunity has to do with the means of enforcement. In the instruments examined, the waiver of jurisdictional immunity does not *ipso facto* include immunity from enforcement. For instance, Article 5, paragraph two of the headquarters agreement between the Eastern Republic of Uruguay and MERCOSUR for the operation of its administrative secretariat indicates that a separate statement will be required for a waiver of immunity from enforcement.

As stated earlier, the waiver of jurisdictional immunity must be express. By the same token, merely appearing before a court does not entail the waiver of immunity if the organization has asserted it.[23]

[21.] See note 13 *supra.*

[22.] Article II, section II of the United Nations Convention and Article 2 of the OAS Agreement on Privileges and Immunities.

[23]. Final Judgment 2.440/2010. Supreme Court of Justice of Uruguay. *Sienra Castellanos, Félix, et al. v. Unión Postal de las Américas, España y Portugal- U.P.A.E.P. – Cobro de pesos y daños y perjuicios – CAUSA DIPLOMATICA,* December 24, 2010, CASE FILE 1-100/2009 "The waiver of jurisdictional immunity operates if that waiver has been made expressly; that is essential. The lawsuit enjoys jurisdictional immunity unless immunity is waived, and that has not been proven in the instant case; on the contrary, the respondent expressly affirmed that such immunity had not been waived."

2. Law Applicable to International Contracts

At the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), Dr. Elizabeth Villalta introduced a new topic, which had not been on the agenda established in August 2013. In that connection, she presented a document entitled "Private International Law" (CJI/doc.446/14) aimed at promoting certain conferences held under the purview of the CIDIP, in particular the Convention of Mexico on the Law Applicable to International Contracts, ratified by two OAS Member States.

Among reasons for such few ratifications she cited the lack of promotion and awareness about it and the fact that back then (1994) these solutions would have been too novel; the provision for autonomous free will; and the reference to *Lex Mercatoria*. Her conclusion was that Mexico could settle many international contracts problems with the Hemisphere's own solutions.

Dr. Negro informed of the participation of them both (the Rapporteur and him) in the ASIDIP meetings, and noted that there was consensus that certain Conventions adopted by the CIDIPs, particularly the 1994 Convention of Mexico, needed reviewing. He noted the interest in having Inter-American Juridical Committee support to disseminate those conventions. Dr. Dante Negro also spoke about the last CIDIP and the impasse about consumer protection, as well as the States' lack of agreement on holding another CIDIP. He said no specific new resolution on CIDIP's had been adopted, in terms of new topics or finding a solution to the consumer issue. He said the Department of International Law had informally approached states to promote ratification of the Conventions on Private International Law.

Meanwhile, Dr. Arrighi, who has also took part in the ASADIP meetings, noted that some members of the ASADIP held senior positions with their governments and never suggested ratification of the Conventions was a priority. He added that doing protocols or amendments to conventions already signed and ratified would depend on the willingness of States Party. A review of the Convention of Mexico should therefore be proposed by Mexico or Venezuela - the only ones to have ratified it. Finally, he noted the important role played by the Inter-American Juridical Committee in creating a network of experts who supported initiatives in this area.

Dr. Salinas said what Dr. Arrighi spoke about was important to understanding why the Convention had not been ratified by a significant number of countries. He pointed out further that if consultations were to be held, they should include experts and practitioners in this field.

The Chairman said that some consensus was already developing: Firstly, on keeping the issue on the agenda for August; secondly, that a study of the convention would be useful; and thirdly, that consultations should be held with the states and experts and practitioners as well.

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Elizabeth Villalta presented another report, entitled "Law Applicable to International Contracts," document CJI/doc.464/14, which refers to all the Conventions on Private International Law adopted at the Inter-American Specialized Conferences on Private International Law (CIDIP's).

She explained that some countries indicated that the translations of the Conventions were not particularly felicitous, and that that was an obstacle to its ratification. However, she mentioned that there were ways of correcting those deficiencies, so she suggested that the Committee bring countries' attention to the mistakes.

She said the Convention needed to be more widely disseminated, especially considering the current importance of international contracts and international arbitration. The conventions on this subject could resolve many of today's legal issues, such as the free will (contractual freedom) principle. This principle had been incorporated into Venezuelan legislation and in a bill (draft law) in Paraguay. Thus, material incorporation could, she said, be the path to reception of the principles enshrined in the Convention.

Finally, she said that the benefits of the Convention included receptivity to the principles of *lex mercatoria* and various other principles developed in international forums and trade customs and practices.

The Co-Rapporteur on the subject, Dr. Collot, gave an oral presentation of his report, called "Inter-American Convention on Law Applicable to International Contracts," document CJI/doc.466/14 rev.1. He highlighted the applicable legal instruments and broadly compared the Inter-American instrument with the European Treaty. He also expounded the principles regarding determination of the consent of the parties and the equivalence or near-equivalence of the considerations. He noted that the Convention on the Law Applicable to International Contracts does not cover extra-contractual obligations derived from the performance of contracts. Accordingly, he proposed directing the discussion toward the possibility of expanding the domain of applicable law under the Convention.

Regarding the translations, Dr. Arrighi said there had been no clear indication of where errors had been committed. In his view, the problem had to do with the difficulty of reconciling the vehicles used for solutions: uniform laws and uniform conventions.

The Chairman pointed out that silence with respect to ratifying was in itself a form of political response. Dr. Salinas said that some instruments adopted in The Hague suffered the same fate as some of the Inter-American conventions, in the sense of being ratified by only a handful of States. Dr. Elizabeth Villalta pointed out that her report mentions the possibility of incorporating solutions (developed in the Convention) into domestic law, as Venezuela had done and Paraguay was in the process of doing.

The Chairman then proposed, as a way of concluding this discussion, that the Rapporteurs consult the States, including practitioners and academics, and that they come up with pertinent questions for the Secretariat to distribute in the form of a *questionnaire*. This proposal was adopted by the plenary.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), one of the Co-Rapporteur for the topic, Dr. Elizabeth Villalta submitted a new version of the report, document CJI/doc.464/14 rev.1, which incorporates actions taken in the subject matter by other international organizations, such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for Unification of Private Law (UNIDROIT). Additionally, the document explains the implementation process of the principles of the Inter-American Convention on the Law Applicable to International Contracts (1994 Mexico Convention), as conducted by some States in their domestic legislation, using as examples the laws of Venezuela, Dominican Republic, Panama and Paraguay.

Lastly, she released the *questionnaire* written for the States and academic experts and said that the first version of the *questionnaire* had been forwarded by the Secretariat to the Permanent OAS Missions in the second week of March and that, thus far, no State has responded.

The Chairman suggested that two *questionnaires* be drawn up: one on international contracts and the other on the challenges faced by the region in the field of private international law. He also requested Co-Rapporteur Villalta to disseminate the questions to the other Members prior to submitting them to the States and experts, leaving the decision on formatting and content up to them.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Co-Rapporteur for the Topic, Dr. Elizabeth Villalta, introduced the document "Law applicable to international contracts" (CJI/doc.487/15), reviewing the first four responses to the questionnaire sent to the States, that had been received as of then (Bolivia, Brazil, Jamaica and Paraguay). Additionally, she mentioned and thanked academicians who responded to the questionnaire: Mercedes Albornoz, Nuria González, Nadia de Araújo, Carmen Tiburcio, Sara Feldstein de Cárdenas, Cecilia Fresnedo, Sara Sotelo, Didier Opertti, José Martín Fuentes, Alejandro Garro and Peter Winship.

Dr. Stewart mentioned that academia's support of the Mexico Convention appeared to be weaker than was anticipated and he added he felt there was more of a consensus on drafting a Model Law or Guiding Principles on the subject.

Dr. Villalta proposed sending a reminder to the States that have not responded, because no time limits were established for responses. She stressed that the responses submitted by most of the experts revealed that the Mexico Convention was very forward thinking at the time it was approved, but in our times, the consensus seemed to support a soft law solution.

The Vice-Chairman noted that the consensus of the Juridical Committee would be to keep the topic on the agenda and he requested the Secretariat to send out a reminder to the States, reflecting the importance the Juridical Committee attaches to Private International Law.

At the request of Dr. Correa, the Chairman requested the Secretariat to incorporate in the multiyear agenda the topics that arose during the Meeting on Private International Law between the Inter-American Juridical Committee and the American Association that took place on Friday August 7, and was attended by accomplished professors and experts.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), one of the Co-Rapporteur for the Topic, Dr. Villalta reminded members that at the 86th session a *questionnaire* was approved and sent out to Member States and experts on the subject; replies were received from the following ten states: Bolivia, Brazil, Jamaica, Paraguay, Argentina, Uruguay, Mexico, Panama, Canada, and the United States. Additionally, a total of fifteen experts responded to the questions: Professors Mercedes Albornoz, Nuria González, Nadia de Araújo, Sara Feldstein de Cárdenas, Cecilia Fresnedo, Sara Sotelo, Carmen Tiburcio, Didier Opertti Badán, José Martín Fuentes, Alejandro Garro, Peter Winship, Diego Fernández Arroyo, Aníbal Mauricio, Dale Furnish, and Carlos Berraz. She thanked all of them for their responses.

Most States were in favor of the principle of freedom of choice. Additionally, a majority supported the choice of the place with which the contract had the closest ties, in the event that the parties themselves had not determined the applicable law or that their choice was ineffective.

In response to the question on the need for an amendment to the Inter-American Convention, most states indicated that the political context should be taken into account.

Finally, in relation to the development of the CIDIPs, most considered that more promotional work should be done. Interest was also expressed in holding a general conference to discuss the virtues of updating inter-American conventions, if necessary.

Dr. Villalta also drew attention to the response of Paraguay, which described the influence of the Mexican Convention in adopting the recent law on Private International Law.

In her analysis of the replies of academicians, the Rapporteur verified that the vast majority noted the advanced nature of the Mexican Convention for the time, and the fact that its principles were consistent with the current commercial context. She also noted that some professors indicated a certain apprehension regarding the scope of the principle of freedom of choice. With regard to the Mexican Convention, some experts expressed favorable opinions, others proposed a model law, or that the Convention be used as a reference for drawing up a guide on principles of Private International Law. On this point, some academicians suggested that a conference be held using the principles in CIDIPs to develop model laws. In addition, the Rapporteur noted that there was no participation from Central American experts.

In concluding her presentation, the Rapporteur expressed support for the initiatives and suggestions of experts in favor of disseminating and promoting the development of Private International Law in the region.

Dr. Pichardo reported that the Government of the Dominican Republic had answered the *questionnaire* and that he would check to see why the Rapporteur had not received it.

Dr. Stewart mentioned that it was his understanding that there was substantive support for the Mexican Convention, but there was no interest in developing a model law or proposing

amendments to the Convention. Thus, in his opinion, the next step in this case should be a meeting of experts to work on preparing a guide of principles on the subject.

Dr. Salinas, in light of the explanations given, noted that there was not a great deal of interest in ratifying the Convention. He then stated his agreement with Dr. Stewart's proposal to hold a meeting of experts with broad representation to prepare a guide on principles.

Dr. Hernández García noted that what had happened with that convention exemplified a pattern with international organizations, in which a theme is developed and an instrument designed, in the hope of having an impact on development of the theme domestically. In this context, he pointed out that the OAS Convention attained its objective and that it had affected and influenced internal systems in a variety of ways, as stated by the Rapporteur. He proposed that consideration be given to working on an interpretative guide, and suggested that the Rapporteur, with the support of the Secretariat, prepare a draft guide for evaluation by the members.

Dr. Moreno referred to how it had evolved since the 1990's, with the development of arbitration as a means for settlement of disputes, and the influence of the basic principles of the Mexican Convention, which are already part of the domestic legal systems in a number of countries in the Americas. In this regard, he advocated accepting the same principles of arbitration in areas of traditional justice. He pointed out that some of the countries of the region were already in the process of amending their laws in the field of Private International Law, and so he considered that it would be highly relevant to prepare a guide to benefit many.

Dr. Correa expressed her agreement with the suggestion of preparing a guide.

Dr. Villalta said that in beginning her work as Rapporteur, she had not given thought to the objective of influencing ratification of the Mexican Convention, but was focused instead on promoting the pool of Private International Law of inter-American conventions. Thus she suggested that in addition to preparing a guide, this space should be used to promote the entire system of norms governing Private International Law.

Dr. Negro indicated that the Committee Secretariat was available to support the work of preparing a guide. He said that this is an ideal example of a case where the success of a Convention is not reflected in the number of ratifications. Conventions can be influential in other ways, such as by ensuring that their principles are inserted into domestic legal systems. He further noted that many of the obstacles to possible ratification did not seem to have to do with the content of the Convention, and that it may ultimately be possible to use its principles, together with the principles derived from The Hague Conference on the subject.

In concluding this discussion, both Dr. Villalta and Dr. Moreno referred to problems in the translation of the OAS Convention that affected its ratification.

Members agreed that the next step would be to have the Rapporteurs draft a guide on principles, to be presented at the next session, with the support of the Department of International Law as the technical secretariat of the Committee. It was also agreed to designate Dr. Moreno as Co-rapporteur on this topic.

It should be noted that during this session the Inter-American Juridical Committee organized a roundtable with experts on Private International Law where it was discussed about the future of Private International Law and specific topics, such as the Inter-American Convention on the Law Applicable to International Contracts; the written report of the roundtable is registered as document DDI/doc. 3/16.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Dr. Villalta recalled the background of discussions on the issue of international contracts and informed about the guide on international contracts drafted with Dr. Moreno. This guide is based on the main principles of the Mexico Convention on the Law Applicable to International Contracts, on The Hague Principles on the Election of the Law Applicable to International Contracts and the most important international instruments in this field. She also reported that the responses to the *questionnaire* sent to the States were also used for the drafting of

the Guide. In addition to the surveys carried out with professors and jurists of the Hemisphere that were please to support the initiative of the Committee. Dr. Moreno, on the other hand, stated that he could notice the merits of the Mexico Convention, despite its low number of ratifications. The lack of ratification of the Convention was due, in his opinion, to three causes:

- The juridical community in the year 1994 was not prepared to receive a document of that nature.
- Certain formulations were a compromise text resulting from diplomatic discussions, such as for example articles 9 and 10.
- Some of the terms were not effectively translated into English.

In this context, the Rapporteurs proposed that the Committee adopt a set of guiding principles whose purpose would be similar to that of the Convention, considering that the guide can be used as a model for domestic legislation and become an academic reference for law operators regarding the solutions proposed in the Mexico Convention, among others. In addition, the guide will facilitate interpretation and understanding of complex concepts such as autonomy of the will and therefore can be useful for judges and arbitrators to use it in their decision-making processes. This can have an impact and lead to the ratification of the Convention and serve as a model to facilitate amending national laws and expand the scope of possible solutions, including the proposals of the principles of The Hague.

The Chairman congratulated the Rapporteurs for the explanation on the reasons for the lack of success of the Mexico Convention. Similarly, he expressed his support for the perspectives on the guide proposed by the rapporteurs.

Dr. Salinas questioned about the added value and relevance of a guide in the light of the principles of The Hague, considered an authority within the Organization on the subject and for that reason he found that a model law would be more advisable.

Dr. Villalta said that the added value of the guide is to expand the American regulatory system to incorporate more modern solutions in the national systems. She mentioned that during the 88th Session, in Washington, the Plenary decided to support the rapporteurs in the preparation of a guide that being the reason why they did not consider reasonable suggesting a model law.

Dr. Moreno referred to his experience in UNCITRAL where he worked on a legislative guide, a forum in which there were also doubts about the nature of the instrument. However, there is agreement that those solutions must be useful for individuals and not bind States to specific systems established in treaties, and that participants must have access to them.

The proposed guide contains the most modern solutions worldwide for international contracts, in light of the various international instruments, including the Convention of Mexico and is expected to serve the legislator, the judge, and even the arbitrators.

Dr. Mata Prates also congratulated the rapporteurs. He noted a norm inflation in the Americas, particularly in Latin America. Therefore, he considered of great value a "soft law" proposal by the Committee to be used by jurists to help interpreting and applying existing norms. In his view, drafting a guide seems to be a good methodology.

The Chairman recalled that among the documents distributed there is one on the progress of the rapporteurs, including a selection of the norms useful for the proposed guide. Rapporteurs would also need members to analyze the possible solutions presented. As no member had objected the solutions offered, he asked the rapporteurs about the elements needed to transform the project into a guide.

Dr. Moreno said that it would be important to ensure that the material presented is the best that the Legal Committee can draft.

The Chairman asked the rapporteurs if they had received Dr. Stewart´s remarks on the document, and Dr. Moreno explained that Dr. Stewart had contributed to it.

Dr. Salinas required time to discuss the topic with specialists on Private International Law in his country before sending his comments.

Dr. Hernández García proposed the theme to be examined together with the legal counsels in order to have their opinions and direct feedback.

The Chairman agreed to Dr. Hernández Garcia's proposal and suggested distributing a copy of the draft presented by the Rapporteurs to the legal advisors of the Ministries of Foreign Affairs.

At the end of the discussion, the plenary agreed that the Rapporteurs would submit a document at the next meeting.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), both rapporteurs, Drs. Elizabeth Villalta and José Moreno, shared their views on developments on the subject matter. Dr. Moreno mentioned efforts concerning the law of contracts and the 1980 Rome Convention in Europe and developments in the regional arena, with the Bustamante Code, the Montevideo Code and the work of the Inter-American Conferences on International Private Law (CIDIPs). In fact, he established that in the Americas, the 1994 Mexico Convention (MC) had a similar importance to that of the Rome Convention earlier in Europe. It offered solutions that in some ways were better than those proposed by the Rome Convention, although the MC is an instrument ratified by only two countries - Mexico and Venezuela. He did clarify that Paraguay recently incorporated it into its domestic law. Dr. Moreno then explained the developments of The Hague Conference on Private International Law (PIL) in the area of contracts and, in particular, The Hague Principles, which are intended to aid legislators in their efforts to modernize contract rules. In fact, he noted that both the advances of The Hague and of the regional Convention have been a catalyst for the legislative changes in his country, Paraguay.

Dr. Moreno explained that because Dr. Villalta was concerned over the low number of ratifications and the meager progress of the region on this topic, she prepared a questionnaire on the subject, which was distributed to the States and to academics. The Committee has also looked at the possibility of writing a model law and finally settled on a guide, that would be for more than just legislative purposes, but would also recount the progress made over the past 20 years and would also be available to a wide body of users, including students, arbitrators, etc.

Dr. Moreno then provided an update on the status of the project under his rapporteurship, including an outline of the guide prepared by the Department of International Law, which incorporated the rich responses to the questionnaire that had been received from throughout the region. The draft guide, currently consisting of 150 pages, is intended to explain the guidelines in a simple way, using examples and comparisons in order to assist in each one of our States. He proposed submitting the first draft to the Committee at the next meeting and concluded by expressing hope that the final work product, after considerable fine-tuning, will become what was intended in 1994, but was never achieved.

Dr. Villalta elaborated on her report, document CJI/doc.525/17, emphasizing the interest in the topic and explained the efforts made by the Committee on the subject matter. She stressed that the questionnaires had been sent to all of the OAS Member States and noted that several international public law experts had commended the Committee for taking up the topic. She further noted that the guide was needed for our own region in order to bring together elements of the Mexico Convention, The Hague Principles and the codes of the OAS Member States themselves. She concluded her presentation by reviewing the list of common aspects to the Mexico Convention and The Hague Principles. She explained that these were elements that would be used in the guide.

Dr. Moreno added that he had participated in the Working Group of The Hague Conference to draft the Principles and then later served as his country's representative in the political body that approved the document. At said forum, he said, the contribution of the Mexico Convention was consistently recognized as one of the principal sources.

Dr. Mata acknowledged that the purpose was to create a guide of these principles. He concurred that the States were not interested in ratification of the regional convention. However, he

felt that we would have the Mexico Convention for some time to come as a point of reference. He said that although there could be hope that the guide would become law, common among States, he thought that for now, that was a bridge too far to cross.

Dr. Hollis asked about how the rapporteurs' document would deal with the differences between the Mexico Convention and The Hague Principles, in view of the fact that the former encompasses all kinds of contracts, while the latter addresses full party autonomy to commercial contracts. He wondered, therefore, whether the guide was intended only for commercial contracts.

Dr. Hernández said that the objective was to standardize rules so that when a company from one State does business with a company from another State, they are able to do so smoothly. He also contended that the essential thing was to promote international business, and a guide on the subject matter would be the ideal way to do so. It should offer the best advice to the user for purposes of finding the most pragmatic solution to facilitate private exchange. In his view, that would be the added value for all who use it.

The Chairman stressed the importance of having the input of the experts in the field of private international law. He also emphasized that the Committee should offer products that would be of use, in keeping with its objectives. He said that precisely on this last point he harbored some doubt as to the consultative role of the Committee (emanating from the Charter). He wondered whether it would be going a bit beyond the scope of the Committee's objectives. In his judgment, the guide should have a legislative nature and assist international trade, as Dr. Hernández had said. Therefore, he thought it should be a legislative guide addressed to the States so that they could modernize their laws. He felt that a 150-page manual seemed more like a "declaration" and suggested a shorter format.

Dr. Moreno addressed the Chair's concerns by explaining that last April the decision had been made to write a draft guide. He felt that if the approach were to change at this point, a great deal of the prior work would be lost; however, he acknowledged he was open to whatever the Committee should decide.

He has found that many legislators, even professors, did not have much of an understanding of private international law and, for this reason, the guide was intended to simplify the material and make it more accessible. He was concerned that legislators could take 25 to 30 years to amend domestic laws and regulations; while arbitrators, judges and many others could truly benefit right now from the guide. What was being created by this document, he stated, was essentially "soft law."

Dr. Moreno agreed with the comment of Dr. Hernández that the guide had been originally conceived of for commercial contracts. He noted that even though the current draft was long, it covered a great deal of material; even though it was intended to be simple and comprehensive, it just could not be both at the same time. He pointed out that such a document could also spur legislatures to take action. In 1994, the attitude was: "Don't get involved! The Mexico Convention is too new, we don't understand it!" Circumstances have changed and this guide may prompt further ratifications.

He added that it would be necessary to include further explanation about how consumer and labor law fall outside the parameters of the Guide.

In response to Dr. Hollis, he explained that The Hague Principles did not cover situations where no choice of applicable law had been made, which would have been way too ambitious.

In concluding, Dr. Moreno clarified that the idea had not been to prepare a declaration, but to explain the solutions from the Mexico Convention, The Hague Principles, and thus guide legislatures and, in so doing, serve the parties.

Dr. Villalta specified as well that the objective was to harmonize laws in the Americas so that States know how to act with respect to international commercial contracts. She suggested perhaps a document listing all of the regulations and explaining them all.

Dr. Correa understood that the guide was not only intended for legislative purposes, but was also intended to be sufficiently explanatory to be useful in other areas. She thought that the work, as conceived, was fantastic.

Dr. Hernández mentioned that perhaps the end user could be best determined after the Committee looked at the final product. At that point, it would be easier to decide whether it would be more suitable for legislators, judges, the parties, etc.

He also noted that the Mexico Convention had started out with good intentions. Nonetheless, its results offer good reason for political entities to consider whether or not to undertake the work of codification through a treaty. Thus, it was not necessary to go through a treaty and it would have been better to use a soft law instrument. Consequently, this stands as an example of the need for caution when embarking on a codification process, which requires a great deal of effort and resources.

Dr. Mata Prates felt that this exchange of ideas has brought the Committee closer to its goal. He also noted that it was an academic labor, which has its own rules; while the Committee also has its rules and even though we could have chosen a model law, we decided on a guide. He thought that it would be useful to introduce a guide because few States have a law on this subject, in addition to the non-binding nature. The CJI could, in this way, make a meaningful contribution to a very important area with practical application.

Dr. Moreno answered the last comment regarding a model law, by clarifying that the guide was not intended to go against the Mexico Convention, about which he said he is proud. If it is properly interpreted, he said, the regional convention would partially or totally solve core issues, such as party autonomy, selection in a narrower sense, etc. The important thing was for parties to be able to get what they had intended out of contracts. This is what arbitration had achieved so successfully. He said that at all national levels, States could ratify the Mexico Convention or they could rework it in combination with The Hague Principles. He noted that these two instruments had been immediately useful and provided examples where courts have already used them. His goal was for the guide to become an equally useful document.

The Chairman recognized the importance of this work and clarified that his remarks were intended to highlight the function of the Committee, which is not the same as that of other bodies. He understood this document to entail enriching the Mexico Convention with The Hague Principles and, from his point of view it would be a guide to aid legislative bodies because it is grounded in facts.

When the analysis of this item concluded, the rapporteurs were asked to submit a draft of their proposals at the next regular meeting.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the Rapporteur on the subject, Dr. José Moreno, elaborated on his report, "First draft of the guide on international contracts in the Americas," document 540/2017 corr.1. On this occasion, Dr. Moreno explained the subject background, noting in particular the initiatives of the Committee and the contribution of the Department of International Law in the research it conducted. He also noted that the report reflects a collective effort in which many experts from different countries of the Hemisphere have taken part, such as accomplished professors from Argentina, Brazil, Canada, the United States, and Uruguay.

In his description of the report, he said the introduction explains the beginnings of international private law and efforts in the global arena (The Hague Conference, UNCITRAL and UNIDROIT), as well as in the inter-American arena, citing the Bustamante Code, the 1940 Treaties of Montevideo, in addition to mentioning the work of the CIDIPs (underscoring the high number of ratifications). At the regional level, he cited processes of integration within Mercosur and the European Union.

Under the heading of codification techniques, the Rapporteur explained that over the past 20 years, 10 conventions have been adopted out of a total of 79, mostly of a procedural nature, and he

expressed his concern over difficulties in the diplomatic process of treaty approval and ratification, which means that many instruments do not end up being ideal or are subject to reservations, thus undermining their unifying purpose.

He said our times have seen a proliferation of mostly soft law instruments; out of a total of 65 instruments adopted over the past years, 11 have been in the sphere of the OAS, in particular at CIDIPs VI and VII, and he noted in this regard the contribution of the CJI through the model law on access to public information, the model law on simplified stock corporations and the model law on electronic customs receipts for agricultural products.

In this context, he presented the Committee's objectives through the adoption of a Guide to international contracts, which takes into consideration elements of the 1944 Mexico Convention:

- Facilitate the adoption of solutions through different mechanisms (calling for either adopting the OAS instrument or regulating said principles in domestic laws);
- Serve as an interpretative guide and even as a lingua franca for judges, arbitrators and contracting parties;
- Facilitate throughout the region the acceptance of universally widespread solutions with respect to party autonomy and acceptance of non-state law;

Next, Dr. Moreno gave a list of anachronisms in the field of contracts:

- Longstanding or 'out of date' legal solutions;
- Lack of consolidation of the principle of party autonomy and its derivatives;
- Reticence regarding acceptance of non-State law;
- Failing to find equivalents of non-state law in the legal and arbitral sphere;
- Use of the notion of public order in the sphere of private international law.

Consequently, in addition to being the first in the region, the guide will serve as a bridge instrument to the work carried out by The Hague Conference and UNCITRAL.

Upon making the report available, the Rapporteur invited everyone to take whatever time necessary to review it, given that it is not his understanding that the final version would be adopted at this meeting.

Dr. Villalta was pleased with the draft document, which follows the evolution of private international law, an area that has been very relevant to the work of the Committee in the past. She mentioned the usefulness of the guide to different stakeholders in light of recent processes of integration. She highlighted the positive influence of the Mexico Convention both at the universal and regional level and the Committee's potential to make a new contribution through the Guide.

Dr. Carlos Mata Prates thanked the rapporteurs for contributing novel private law solutions anchored in public international law, notably arbitration and dispute resolution clauses, noting the positive effect on national and international courts. He concluded by voicing his support for the adoption of a guide by the Committee, whose contribution will be effective to the extent that it is disseminated among operators and is accepted by them, given that this type of instrument is not binding.

Dr. Hollis expressed his gratitude to the rapporteurs noting the wide-range of material covered by the report. He asked whether it was pertinent to include historic aspects in a document of this nature. In the English version, he said, the explanation of the motivation of the guide is not very clear, perhaps because it does not take into account the audience it is targeting. Lastly, he found it necessary to draw a distinction between the descriptive and the normative parts, and commented that this should be reflected equally throughout the report. In this regard, he requested brief summaries to be included. As to the contribution of the Committee, he expressed the need to list available alternatives with their respective explanations and reasoning, which means a decision must be taken as to whether we want a document of a normative nature or a compilation.

Dr. Hernández expressed his appreciation for the impressive document, in addition to commending Dr. Villalta for the explanation about the motivation for the Guide, which is to aid operators in making decisions on the subject of contracts and not pursue further ratification of the Mexico Convention, in view of the fact that treaties should not be considered the only legal solution. As to the content of the report, he thinks that the document could be adopted as presented by the Committee, but he fears that in its current version it would not achieve the intended purpose, because we are not seeking an academic but rather a practical document. For this reason, it must be more concise, clearly identify the normative part and explain the principles and solutions to be promoted based on benchmarks that were found.

The Chairman reiterated his congratulations to the rapporteurs and cited the solutions proposed by global and regional instruments. He urged the rapporteurs to create a report that moves on to a second normative sphere, identifying the norms from which contracts in the region should draw.

Dr. Baena Soares endorsed the comments in favor of a proposal that offers practical aspects to aid operators of the law in their work, supporting the adoption of a guide. While he regards himself as a neophyte in the subject matter, he asked the rapporteurs to continue with their work.

Dr. José Moreno asserted that even though it is not the intention of the rapporteurs, the Guide could lead to ratification of the Convention. With respect to the comments of Dr. Mata Prates, the Rapporteur agreed with its usefulness in the area of arbitration, and that it could serve as an important benchmark for the States, and the specialized institutions, in the same way that The Hague Conference and UNCITRAL have, and this can help to disseminate and support it.

As to the comments of Dr. Hollis, he explained that mention of historic background is necessary because of the lack of familiarity with it by operators. He clarified that the Secretariat is cleaning up the English version. Regarding the audience, the expectation is that these instruments serve a broad range of stakeholders, actors such as legislators, judges, parties and, therefore, the ideal thing would be to make clear throughout the document that the operator is very much at the forefront. He clarified that the Guide aims to provide a reasonable and well-founded explanation about the status of the issue in each particular case. The Rapporteur is intending to provide a collection of the positions of the States. As for the normative part, he fears that in seeking to take a position on certain points, a choice has to be made between the Mexico Convention and The Hague Principles and, consequently, this alternative should be seriously evaluated. Today's guides are complex, technical and extensive and the Rapporteur has taken particular care in drafting a more brief and to-the-point product; in fact, it was shortened from 300 to 120 pages. With relation to corrective solutions, he proposed revisiting principles of the Mexico Convention, although the Conference also offers good options. In response to Dr. Hernández, he agreed about the need to produce a practical report, but that it cannot be shortened more than it already has been. He noted that we do not have the same conditions as The Hague Conference, which was supported by other institutions and experts from all over the world and was conducted over a much longer period of time. He proposed keeping the text in its current form, while considering the technical aspects of it, and voiced the need for the region to have an instrument available in the near future.

Dr. Hernández clarified his previous remarks expressing interest in producing practical reports that offer relevant solutions to address the issues raised, because the alternatives proposed in some instances varied widely.

Dr. Richard expressed his appreciation for the work in support of Dr. Hernandez's remarks, and mentioned the complexity of the proposed topics in the report and, in his case, even more so because they are not in French. He asked for these reports to be translated to enable wider dissemination of the Committee's work among experts from his country, in addition to international organizations such as the African Union.

Dr. Mata Prates underscored the difficulties that arose in light of the fact that no consensus has been reached on some topics, and he expressed his gratitude for the efforts made by the rapporteurs in summarizing positions in the report. He asked the Rapporteur to reduce the high

number of options to as few as possible, choosing only solutions with a solid foundation. He fears that it will lose effectiveness if it does not help the operator with concrete solutions.

The Chairman noted his concern over the practical nature of the Committee's work, because the intention is not to criticize extensiveness. The expectation in the end is for the document to serve as reference material and aid in explaining proposed solutions. It is intended to explain how a solution is and is not incompatible with the standards and thus move forward in the normative area, whether the norms are final or, where there is no agreement, it should be so indicated.

Dr. Duncan Hollis felt that more clarity is needed about what we are trying to do, a kind of road map. The document already describes what we are doing, but in each case, it should determine where there is agreement, disagreement and ambiguity. When there are mixed opinions, we must decide which one is the most appropriate one and explain our reasoning. The challenge is to figure out whether we are seeking to create a supplemental document to The Hague Principles or a replacement to it. In fact, the report will be valuable even though there may be disagreement and no solutions can be offered.

Dr. Ruth Correa highlighted the comprehensive compilation put together by Dr. Moreno, and, echoing her colleagues who spoke earlier, she felt it is necessary to find possible solutions to applicable norms and procedures. Concretely, she suggested not including topics of arbitration in the study, because they involve issues that could be categorized as quasi-contractual. This topic could actually give rise to a separate paper. In fact, she asked the plenary for further explanations on the elements that a guide should include. If we are asking the rapporteurs to imply which ones are the best solutions through definitions, then she will go that route in her report.

Dr. Villalta supported Dr. Correa regarding the issue of the nature of the guide in order to achieve uniformity in the work of the Committee. Likewise, she invited Dr. Moreno to determine what is most relevant to private international law today, in addition to identify applicable law in each case, so a principle can be issued based on the issue.

The Chairman proposed that it is essential to draw a distinction between guides and model laws. The former has a practical side to them, which enables States to apply them based on the principles and standards presented and do not constitute doctrinal or authoritative writings; while model laws are a set of norms that are supposed to aid States in legislating.

Consequently, he proposed to the Rapporteur to keep the report as it currently stands as a point of reference for the guide.

Dr. José Moreno expressed his appreciation for the opinions and comments, noting his interest in presenting a practical document that provides solutions and options in areas of agreement and disagreement. He clarified that The Hague Conference does not have guides, but UNICITRAL and UNIDOROIT do. These guides are characterized to a great extent, among other things, by being extensive, complex and explanatory documents. There are variations in guides; in this regard, he proposed following the example of the UNIDROIT Guide on agricultural land investment contracts. It has an index, preface and includes an explanation, providing context to the topic without taking positions, but presents an opinion. UNCITRAL, for its part, does have guides that take positions.

He expressed his interest in drafting a quality document that respects the requested criteria. The positive thing about the guide, he said, is the flexibility to expand documents and even propose corrections. As to the topic of arbitration and investments, he added it is something that can be put off until a later date.

Dr. Ruth Correa asked about the level of confidentiality of these documents, and whether the rapporteurs are able to consult with experts prior to presenting them to the plenary of the Committee, to which the Chairman responded in the affirmative and said the rapporteurs may consult on an individual basis with anyone they deem pertinent and also propose engaging in consultations with other bodies, which must be approved by the plenary.

In concluding, the Chairman drew a distinction between guides flowing from non-governmental and governmental organizations. In thanking the Rapporteur, he asked him to take the observations into account to create a new version for the next meeting.

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3. Representative Democracy

Documents

CJI/doc. 524/17	Guide for a reflection of the Inter-American Juridical Committee on "Representative democracy in the Americas" and the reports of the rapporteur (Presented by doctor Hernán Salinas Burgos)
CJI/doc. 537/17	Representative democracy in the Americas (Presented by doctor Hernán Salinas Burgos)

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2014), Dr. Salinas suggested including "Representative Democracy in the Americas" as a new topic for the Committee's agenda, in keeping with talks held with the OAS Secretary General, Mr. José Miguel Insulza, at the start of said working meetings. The proposal involves a study to consider the progress achieved by the Organization on this subject matter. Dr. Salinas' initiative was supported by the plenary, and he was appointed the topic Rapporteur.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), the Rapporteur, Dr. Hernán Salinas, presented his report titled "Representative Democracy in the Americas: First preliminary report," registered as document CJI/doc.473/15. He pointed out that the report is of a preliminary nature and the purpose thereof is to participate in the Inter-American Democratic Charter, based on a suggestion of the Secretary General during his visit to the Committee at the previous meeting in August 2014. He explained that the report is based on two premises: 1) There is no distinction between the principles of the Inter-American Charter and the principle of non-intervention, as it is a fallacious dichotomy; and 2) the topic encompasses both original democracy and comprehensive and substantive democracy.

As for the major challenges posed by the Inter-American Democratic Charter, the Rapporteur highlighted a few challenges of a preventive nature. In this regard, he proposed further empowering the Secretary General through, among other things, the ability to eliminate the consent of the State for the Secretary General to act under Article 110 of the OAS Charter. All of this would enable early warnings or monitoring mechanisms to be put into place. He also mentioned several different proposals, which would include formulating annual reports; general assessments; creating a position of special rapporteur for democracy or a high commissioner; strengthening the support capacity of the Organization; and, preparing a compendium of best practices.

In the view of the Rapporteur, it would be appropriate to institutionalize the mechanism of good offices and more precisely define in what circumstances democracy would be in jeopardy, inasmuch as a lack of precision in the terms fosters subjectivity in decision-making on when the Organization is able to act.

Another challenge pertains to the capacity to accede to the Inter-American Democratic Charter and, in particular, the bodies of government that would be in a position to set the established proceedings into motion. A broad interpretation of the reference to "government" could provide for the ability of other branches of government such as the legislative body or the judiciary to do so.

Additionally, he called into question the use of suspension as a punishment provided for in the Inter-American Democratic Charter, and proposed giving broader leeway to attempt other alternatives before resorting to suspension.

Dr. Baena Soares noted that the topic involves ongoing attention by the Organization, which it has been receiving since approval of resolution AG/RES. 1080 (XXI-O/91), "Representative Democracy." He warned, however, that we must proceed with caution. As an introductory comment, he remarked that despite the importance of the political agreement achieved with the Inter-American Democratic Charter, it has a lower hierarchical rank than the OAS Charter.

Prevention is of the essence and it must emanate from within a country, it cannot be imposed through multilateral instruments. There is no specific recipe to defend democracy. The OAS's role in prevention is the support it can offer the States. Prevention is a domestic function of each State and educating new citizens is the way to ensure democracy for the future.

The Chairman agreed that the topic of democracy has consistently been on the Committee's agenda. He also mentioned that the Inter-American Democratic Charter must be analyzed in conjunction with the other instruments in order to have the full picture, including resolutions approved by the Juridical Committee.

Dr. Mata Prates supported Dr. Baena Soares' ideas and points. He disagreed with the use of the phrase "partial cession of sovereignty," in view of the fact that sovereignty is never ceded by the State. Another point of concern is the tendency to increase the powers of the Secretary General, because in his view, the OAS Charter strikes the proper balance in this regard and it is unwise to change it. Lastly, he remarked that the subject of early warning depends on how this legal concept is defined, as it is quite a broad concept *a priori*.

Dr. Villalta recalled that the Inter-American Democratic Charter was approved at a specific point in time and that the States had been pressured to work fast in light of the September 11 attacks in 2001.

Dr. Hernández García noted that Article 110 of the OAS Charter already grants implicit powers to the Secretary General as to peace-keeping in the Region and he provided the context of his vision in the context of the impeachment proceedings of President Fernando Lugo of Paraguay. He explained that the Permanent Council did not reach a specific conclusion. However, acting under the implicit powers afforded to him under said Article of the OAS Charter, the Secretary General conducted an *in loco* visit, which gave rise to a compelling report, thus providing for enhanced guarantees to deal with this type of situation.

Dr. Hernán Salinas's comments reflected the opinions of other Members on the need to proceed cautiously and take into consideration other pertinent legal instruments. As for the powers of the Secretary General, he asserted that it is an issue that warrants further clarity and, therefore, he highlighted the different positions expressed during the current theoretical discussions.

When the discussion concluded, the Chairman requested the Rapporteur to take note of the proposals and to present a new version of his document at the next session.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. Hernán Salinas, Rapporteur, recalled that in the previous regular session he had presented a preliminary report "Representative Democracy in the Americas: First Preliminary Report" (CJI/doc.473/15) on the status of the topic throughout the Hemisphere. The debate within the Committee made it possible to ascertain that there is no consensus to amend the OAS Charter or the Inter-American Democratic Charter; and that efforts should be focused on preventive aspects.

As a methodology, he reported that we should be comparing democracy protection norms with other systems, such as UNASUR, the Council of Europe and European Union, in addition to conducting a study on how domestic norms have performed. Particularly, there is a need to learn how the OAS mechanisms work to verify which norms do the best job in the area of prevention and best help at maintaining the democratic structure.

He further suggested thinking about the role of the Secretary General under Article 110 of the OAS Charter and see if it is possible to assign a more active role for him in these matters. Lastly, he proposed to analyze the system of sanctions that is triggered when disruptions occur to the democratic order.

Dr. Baena Soares noted that the best way to prevent and avoid such disruptions to the democratic order is to enable citizens to express in a timely fashion their disagreement with the system or their situation. Consequently, the study must include topics of domestic order and he

suggested reviewing the institutional mechanisms to prevent assaults on democratic order set forth in the Constitutions of the States.

Dr. Moreno Guerra noted that the topic is related to how easy it is for citizens to demonstrate their disagreement with the system or their situation. He believed that speaking about representative democracy is a pleonasm. He also urged the Rapporteur to examine in his study how participatory democracy is addressed. He noted that today democracy is synonymous with voting. However, we must find a space for the common citizen to be able to participate. He recalled that historically the original options in Latin America were either monarchy or presidentialism.

He mentioned that the will of the people must also be able to revoke the term of a President, because those who are eligible to choose a president must also be eligible to recall him or her. Accordingly, we should not speak of disruption of democratic order, when presidents are recalled from office.

He suggested to the Rapporteur to include parameters to review whether a government is democratic and how to maintain or recall the president. He indicated that the topic cannot be limited to the legal authority of the Secretary General.

Dr. Salinas clarified that the mandate is limited to implementation of the Inter-American Democratic Charter. He stressed that the Charter is not only linked to the topic of origin, but also to the exercise of democracy. He recalled that Article 3 of the Inter-American Democratic Charter contains certain elements that make it possible to consider whether a country is truly democratic.

Lastly, the Rapporteur deemed it important to establish that preventive measures must serve to maintain democratic institutions.

The Vice Chairman thanked the Rapporteur in advance for the report of the Rapporteurship that he will present at the next session, noting that the Democratic Charter sets forth the minimum structure required for a State to be regarded as democratic. He mentioned that the Democratic Charter is an important instrument, but it does not have as high a rank as the OAS Charter. As to the comparative methodology, he recalled that Inter-American history and doctrine should be taken into account on the topic.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), the Rapporteur, Dr. Salinas, presented his second report on representative democracy (document CJI/doc. 501/16). In his verbal presentation, he commented on his preliminary report, which had been presented during the 86th Regular Session in March 2015, and contains a descriptive analysis of the practice as it related to the Inter-American Democratic Charter, bearing in mind certain preponderant elements such as non-intervention, the validity of the Charter's mechanisms (without amendment or reform of the instrument), and the principle of integral protection. Additionally, he mentioned the two phases of the mechanism, on the one hand, preventive, and on the other hand sanctionatory.

The Rapporteur then explained that this second report sought to address the preventive mechanisms via the principles set forth in Articles 17 and 18 of the Inter-American Democratic Charter. He further addressed the prerogatives of the Secretary General to act preventively and avert a rupture in democratic order pursuant Article 110 of the OAS Charter incorporated through the Cartagena Protocol of 1995. At the same time, Dr. Salinas confirmed that there should be no confusion regarding the norms, but that the challenge lay in determining the scope of the Secretary General's actions. Accordingly, he proposed looking for tools that could be provided to the Secretary General in this area.

Dr. Salinas discussed two items: (1) Early warning mechanisms; and (2) follow-up mechanisms on democratic order in the region. For these mechanisms to be able to allow for a framework of action for the Secretary General, a unit could be created to compile and receive information. Within this framework there could also be ad hoc rapporteurs to encourage the upholding of democratic order. In fact, he discouraged the creation of independent structures as they could pose obstacles to the actions of the Secretary General or operate according to different

visions. One alternative could be the adoption of a peer-review mechanism, like that of United Nations Human Rights Council.

In conclusion, Dr. Salinas observed that while sufficient mechanisms existed in the framework of the Organization's functions, tools also had to be created for use by the Secretary General. He wrapped up by proposing a third report that would seek to analyze sanctioning and non-preventive mechanisms.

Dr. Arrighi indicated the Inter-American Juridical Committee's reports were of absolute importance given that they served as the basis for advising OAS organs when it came to defending democratic order in the countries of the region. At the same time, he stressed the importance of the base texts as well and noted that the solution to some of the difficulties might be found in existing norms, without having to seek out solutions in the Inter-American Democratic Charter alone. There were a series of norms about democracy adopted in 1985, in addition to a provision of the OAS Charter - Article 2(b) - which stipulated that one of the purposes of the OAS was to promote and consolidate representative democracy. These instruments could help to address some of the gaps in the existing body of rules to defend democratic order. Dr. Arrighi pointed out that this latter provision was the one that made implementation of the electoral observation missions possible. In this regard, if an instrument declared something to be a function of the Organization, this would include all organs thereof, equally including the General Secretariat. Accordingly, the Secretary General would be able to work on those topics.

Dr. Arrighi further referred to another important instrument in this area - Resolution 1080 -, which contained broader language in that it empowered the General Assembly to take whatever measures it deemed appropriate in accordance with international law. In the case of Haiti, this made it possible to continue recognition of the government in exile as well as efforts, together with the United Nations, to implement progressive measures for the return of democratic order.

The Democratic Charter limits the possibilities for action of the Organization's organs, leaving such responsibility to the governments given that they are the ones charged with authorizing any actions decided. Moreover, all decisions fall to the General Assembly or Permanent Council, in other words, to the representatives of the governments.

Regarding electoral missions, requests had to be made by governments and by means of written agreements. Thus, the obstacles or restrictions lay precisely there, in the need for government involvement.

In his opinion, Resolution 1080 follows a more subtle logic than that of the Democratic Charter, where it is all or nothing, with no other options—where a rupture in order occurs, the State is the one left out. There are no nuances; it is not possible to negotiate with anyone. In the case of Honduras, for example, all State organs were excluded from the negotiation process; this, in contrast with the case of Haiti, where the exiled government continued to enjoy recognition and was able to take part in the negotiations.

The second problem lies in the fact that this type of blanket clauses, namely "all or nothing," had been taken up again by other regional bodies like MERCOSUR, UNASUR, the Ibero-American union, CELAC, etc. This distinction was seen in the case of Paraguay, where there was tension between the OAS and the positions of UNASUR and MERCOSUR.

Dr. Hernández García suggested that discussion on the topic be divided into two parts: (1) The role of the Secretary General (his express and inherent powers); and (2) the actors, subjects of collective measures.

As to the first point, Dr. Hernández García noted that it would be important to learn what limits legal, or in its absence then political, were imposed to the Secretary General acting in defense of representative democracy. Perhaps the Secretary General's framework for action in electoral missions could serve to verify such limits. He cited the fact that electoral missions were firstly an initiative of Secretary General Baena Soares, which were followed by a resolution adopted by the General Assembly, underling the fact that a Secretary General's initiative ended up

being regulated by the most senior organ of the Organization. He noted that the resolution established two limits: that the resolution established two limits: First, it expressed the will of the States (they had to consent to electoral missions); and then, the limits imposed by finances—everything had to be done through voluntary contributions. He observed how important the authority inherent to the Secretary General was, given that the General Secretariat is an organ of the Organization. Nevertheless, it should be shown the extent to which the Secretary General is able to discharge his executive functions without limitations.

For its part, the second topic refers to the role played by the definition of each State organ. Dr. Hernández García agreed with Dr. Arrighi about the fact that the Democratic Charter was addressed to governments as both active and passive subjects. Additionally, once a breakdown in democratic order occurred, representation before the Organization was barred. In this sense, it was worth wondering whether the Democratic Charter was directed at States as a whole, wherein the executive branch acted as representative to the Organization. Here was where the question posed by the Secretary General regarding a definition for the term "government" in the Democratic Charter took on renewed significance. He suggested that the provisions of the Charter needed to be explained further and that a determination had to be made as to whether this was a weakness of the Charter or if it was simply the best that could be managed as a political agreement.

Dr. Correa alluded to the prerogatives of the Secretary General with regard to electoral observations in connection with a Member State and recalled the task entrusted to them by Secretary General Almagro with respect to determining the scope of Article 20 of the Inter-American Democratic Charter. Her understanding was that the provisions of the Democratic Charter were restrictive in nature. It is enough to read Article 20 which limits the authority of the Secretary General to the authorization of the States. The Democratic Charter's vision did not appear to provide an opportunity for broader development of the powers of the Secretary General. In addition, the Inter-American Commission and Court could play a role in cases of human rights violations. In this context, the functions of the Secretary General had to be examined in terms of the body of rules that make up the Organization and not just the Inter-American Democratic Charter.

Similarly, Dr. Arrighi agreed with Dr. Hernández García with respect to the consequences of regular electoral missions. When Secretary General Baena Soares began the electoral missions, the States cut funding. He observed that every year the States seemed surprised that such norm existed, but thus far, they had never amended it.

In 2005, the subject of early warnings was proposed and the General Assembly stated that these would constitute interference in domestic affairs and therefore suggested that this matter be treated with great caution.

As to the notions of State and of government, Dr. Arrighi recalled that when it came to imposing sanctions, the entity suspended is the government, as in the cases of the TIAR (Inter-American Treaty of Reciprocal Assistance) and Cuba. It was the same as what was understood with Resolution 1080. In the Democratic Charter the idea was to be more extreme, and as was evident in the case of Honduras, those who ended up suffering were students who had been awarded scholarships for the Rio Course who could not attend the Course and the opposition which was unable to take its complaints to the OAS, etc. No dialogue was permitted with anyone.

What is concerning is the notion that the Democratic Charter trumped all other norms; as is the idea that it prevails over the OAS Charter. The Democratic Charter is a General Assembly resolution and not a treaty.

The Vice-Chairman noted that many of the matters debated here were directly linked to requests by the Secretary General and suggested that the rapporteur take into account the observations made by the members.

Dr. Salinas thanked everyone for their comments, noting his agreement with Dr. Arrighi with respect to the sphere of action the OAS Charter granted to the Secretary General and that at no time did the Democratic Charter override the OAS Charter, which contained broader authority. He

likewise agreed with Dr. Hernández García that the limitations were more political than legal in nature - though they might have legal aspects - and thus, to find them, verification of the practice had to be done. Accordingly, the Juridical Committee should propose realistic solutions or solutions with certain political feasibility. Lastly, he announced that the next report would address the issues raised by the Secretary General.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Rapporteur Dr. Salinas, presented his new report, document CJI/doc.506/16, which aims to facilitate understanding and clarify requirements for the application of the preventive measures of Chapter IV of the Inter-American Democratic Charter.

The report confirms the existence of privileges of the Secretary General to act according to the Inter-American Democratic Charter, and, in this sense, suggests tools for action, provided there is the necessary political will. In this regard, the Rapporteur proposed two types of tools: one of them involving immediate action and the other referring to follow-up activities (also embodying a preventive role).

In particular, he suggested creating a unit within the General Secretariat to deal with early warning mechanisms to gather information and provide access to the various sectors of the countries (different State powers and civil society organizations), thus creating a feedback mechanism to facilitate determination of actions to be conducted by political bodies. The early warning system would then work under the supervision of the Secretary General.

In addition, he proposed inter-State reporting allowing peer assessments in order to facilitate monitoring the situation of democracy in the Hemisphere. In all cases, these mechanisms would provide information to all sectors of the state and access to civil society to the system of protection of representative democracy.

In the second part, the report analyzes the relevance of having a definition of the situations in which the Democratic Charter can be activated, such as in the case of threats, disruption and breakdown of democracy. The need of having rigid definitions that could limit the application of the Democratic Charter was dismissed.

Then the report refers to the need to establish criteria or guidelines on essential elements and fundamental components of the exercise of democracy, as set out in Articles 3 and 4 of the Charter, starting with the practices of the Organization and the proposals of authors. Practice indicates that the action established in article 20 is essential for privileging the diplomatic action prior to any penalty. Criteria are established in relation to Articles 18, 20 and 21 of the Democratic Charter. The conclusions include examples that help to determine each of the situations, having as a standard the degree of involvement articles 3 and 4 of the Democratic Charter. While each situation should require a case study, these criteria could help bodies to make decisions.

Dr. Baena Soares referred to the difficult balance between prevention and intervention in the domestic affairs of States. He dismissed the idea of “an early warning system”, the first difficulty being that of defining the notion of warning. As for periodic reports, he stated that this idea contains interventionist elements. Finally, he noted the difficulties imposed on the international community by *inter pares* reports, as this would imply a risky debating exercise.

Dr. Carlos Mata commented that the title of the document should reflect its contents, which refers to the powers of the Secretary General. With regard to content, the proposals presented in the second part do not suggest amendments to the Democratic Charter, and therefore it would appear that the contribution only refers to the interpretation of the Charter. As regards the reference to "impeachment coups” (which in Uruguay are called political trials) should be clarified what is meant by it. At the end of the conclusions, one should not "insinuate" but rather propose a criterion because the question must be seen as a contribution to the Organization. If the question involves the creation of a new body within the General Secretariat, further explanations should be given, taking into consideration the principle of non-intervention. He did not consider relevant the creation of an organ based on the justification given. At the OAS, it should be careful when

creating an organ with the proposed duties. Finally, he said it was important to emphasize the role of the Committee in providing added value to the OAS activities.

Dr. Villalta requested clarification in relation to the description presented at the final section regarding the breakup of the democratic order, as it was not clear if the circumstances mentioned explain such a breakup by themselves.

The Rapporteur, Dr. Salinas, thanked for the opinions and proceeded to answer the consultations and observations. His language is cautious as he is the Rapporteur and because, at the end of the session, he expects the plenary to decide. As regards the distinction between prevention and intervention, this is explained by the juridical duty of the States in favor of human rights and of representative democracy. The collective action of the Organization within the juridical framework in the Democratic Charter is not an intervention, and therefore the establishment of tools and mechanisms of prevention does not imply that there is intervention, because at the end, the political organs will act, in view of the information that can be remitted by these tools of the Organization. There is a fine line here, but the Organization has the powers to determine class action. The Secretary General should be well informed to submit a theme to the attention political organs. The inter-pairs action is a mechanism of technical information that is not aiming to issue political criticism. In this respect the Rapporteur inquired why a difference is being made between democracy and human rights, and if information is already accepted with reference to promotion of human rights, why is it opposed to start-up reports on about democracy?

As regards the title of the report, he requested not to limit it to the powers of the Secretary General, because the report seeks to strengthen implementing the Charter, and the mechanisms of Chapter IV. The preventive action must be reinforced, without amending the instrument, improving the criteria of the situations allowing enforcement of the instrument.

As for political judgments, the report refers to those cases in which the Constitution or the procedures determined by the law are not respected, as explained in footnote 57. With relation to the description of Article 21, the Rapporteur verified a massive infringement of human rights that implies giving place to a "rupture of the democratic order"

Dr. Baena Soares alluded to the interventionist demonstration in the Dominican Republic in the 60's - last century - and asked to not create new ghosts.

The Chairman observed that the observations made deserve further reflections, both by the rest of the members and the Rapporteur, about the final objective of the work and the direction that he should focus on. In this respect, he consulted with the Rapporteur.

Dr. Salinas confirmed the need for a larger reflection from all the Committee members in view of conceptual differences. He also observed that the membership renewal next year will have the effect on the continuation of the theme. For which it would be important pursuing this discussion and define the work objective. He proposed preparing a new synthesis of the work carried out to improve understanding among new members.

The Chairman appreciated core differences that go beyond personal precisions. For this reason, he suggested not forcing a decision from the Committee, but instead allowing a reflection considering the elements on the table, while recalling importance of submitting a product useful to the General Assembly, agreed by all. He asked the Rapporteur to present a report with the background information on this subject.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), Dr. Salinas presented a report titled "Guide for reflection on the topic of representative government in the Americas," document (CJI/doc.524/17). He recalled that the subject did not arise from an OAS General Assembly mandate, but instead was an initiative of the Committee itself at the suggestion of former Secretary General Dr. José Miguel Insulza. He emphasized that the purpose of the study was to strengthen implementation of the Inter-American Democratic Charter (IADC), without changing the OAS Charter. He also noted that the debate on the third report had revealed differing points of view between the members, that warranted further

reflection and, therefore, he had prepared the Guide focusing on provisions of Chapter IV and Articles 3 and 4 regarding the essential elements of democracy.

As for the first item, he noted that Articles 17 and 18 provide the basis for preventive action, measures regarded as crucial in a context where sanctions must be the last resort.

With respect to the second item, the Rapporteur noted that the role of the Secretary General and its effectiveness under Articles 17 and 18 of the IADC is inherently weak, unless it is read in conjunction with the OAS Charter, which enshrines the promotion of representative democracy and grants the SG an essentially political role; he is not simply an administrative official. He then concluded that the Secretary General has the power to act preventively with some specific exceptions.

In the third section of his report, he mentions the importance of the principle of non-intervention. He noted that the OAS Charter does not authorize unilateral action by a State or group of States, but multilateral action in defense of representative democracy would be acceptable.

As a fourth point, the Rapporteur raised the need for tools to strengthen these normative powers. In this context, he proposed the creation of a special unit for democracy within the OAS Secretariat to assist the Secretary General in obtaining information, a habitual task in other areas, such as human rights.

The fifth part of the report addresses a practical issue raised by current Secretary General Luis Almagro regarding the need to establish criteria as to Articles 18, 20 and 21. He suggested in this regard that said criteria should come from the doctrine and practice of the OAS, which would help to provide greater legal certainty and less discretionary power. He concluded his report by stressing that not only should democracy be defended in its formation, but also in its exercise.

Dr. Baena Soares reminded the Committee of his position on the matter as he had expressed at previous meetings. He emphasized that the topic was *representative* democracy and voiced concern over an academic approach that did not take into account those who were being represented. He cited Article 2 of the OAS Charter as to the essential purposes (g) to eradicate poverty… and that was a barrier to the democratic process. He stressed the need, at all levels, for education about democracy of those represented, in order to ensure that they could choose their own representatives. He said one had to have faith and believe in representative democracy; it was not a prize to be awarded at the end of a process, but rather, an ongoing struggle. That explained his emphasis on the need for education – at all levels. He was concerned that attempts at saving democracy may actually result in its death.

Dr. Mata Prates expressed gratitude for the new advancements in this complex subject but was uncertain about how the Committee could contribute to the GA through this Guide. He appreciated the comments made by Dr. Baena Soares and noted that members did not necessarily share the same understanding of representative democracy. He said that certain activities may not be the result of rupture but rather, different traditions. He noted that the Committee was also entering a difficult area and that no one had requested it to do. As he understood it, States do not cede their sovereignty upon ratifying the OAS Charter, their powers under domestic law were very clear and there was no desire by States to delegate power to an international organization. The situation was governed by classic international law and this was not the European Union, where indeed, States had transferred powers to other entities. Along that same line of thinking, he said that as to the principle of non-intervention, there had not been any such intervention because nearly all actions have been multilateral. In reference to the SG report of 2007 and that another branch of the state might not interpret the term "government" in the same way, he said the classical power of the State to give authorization to the OAS flowed from the executive branch and he felt this paragraph required a better explanation as to why, for example, the judicial powers would be legitimate. He then turned to the concrete measures proposed and noted that most of the legal concepts were ambiguous. He said, with the utmost respect, that even though he was talking about the need to change these provisions to render them more precise, he feared that greater precision could not be rendered in the abstract, without leaving potential room for discretionary power. He

suggested the Committee revisit the objective of a Guide, given the existence of: 1) the OAS Charter, 2) the IADC, and 3) other resolutions adopted by the OAS, because it would be difficult to see what contribution the Guide could make.

Dr. Hollis said that from his standpoint as a law professor, he agreed with Dr. Baena Soares about the importance of education to enable people to better understand representative democracy. At the same time, he saw value in this document. He thought a valuable starting point would be to consider what the SG was already able to do. He regarded this paper to be more about the regulation of the SG than about representative democracy and that the exercise was to objectively examine tools the SG may or may not apply. He thought it might actually serve to strengthen rule of law by outlining what would be allowed and what would cross the line. He mentioned the concept of "implied powers" as the OAS is an international organization and, as has been mentioned by Dr. Mata, was not akin to the EU. He asked what would constitute a violation of the duty of non-intervention, whether only States could violate the duty or could anyone else do so as well. He suggested the Rapporteur might wish to compare actions taken by the United Nations under Chapter 7.

As to section 5 of the report, Dr. Hollis said that lawyers were called upon to engage in interpretation and that it was important to have the conversation on Articles 18, 20 and 21. He acknowledged the Committee members might not agree and that there was a risk of "getting it wrong," but that it would be valuable to assess what these provisions would and would not cover.

Dr. Hernández shared three points with the plenary. First, in relation to the scope of the document, he felt it important that the Committee should continue to discuss this topic, inasmuch as the topic arose at the 10th anniversary of the IADC at the request of the SC and then at the 15th anniversary again at the SG's request. In relation to the preventive measures, he noted that the OAS worked on the basis of the four pillars but that the real "added value" of the OAS was linked to human rights and democracy.

Secondly, he made several specific comments. He liked the preventive action mechanism, although he did not think it required an amendment to the Charter and that consensus would be required to carry out this concept. Regarding the principle of non-intervention and the question as to whether political statements made at a national level would or would not be considered as intervention, his answer would be that they would not because only collective action would be considered legitimate. In relation to section 4, paragraph 4, he agreed with Dr. Mata Prates insofar as the SG has not only had contact with the executive branch but with other branches as well. He found Article 18 unclear as to "who" would be understood as the government entity that could appeal to the OAS. In his view, this could only be the diplomatic representative at the international organization; Article 18 was about the OAS and its strength as an international organization.

Thirdly, he agreed with the comments of Dr. Hollis regarding the nature of the report, and since it was an interpretation, there was no need for a consensus, but everything was contingent upon how the final text to be submitted to the political bodies would be worded.

Dr. Richard commented that he found it was only logical that information should be able to come from other sources, when it was the government itself that had committed the breach of democracy, at which point the SG would bring it to the attention of the Member State to verify the situation. This would create pressure on the government concerned and have an effect on democratic principles.

Secondly, Dr. Richard said that in addition to the academic work, it was necessary to take into account the OAS experience in this field. He recounted the experience in Haiti; since the end of the Duvalier regime, there had been several UN, OAS and joint missions. He wondered why, after all of these missions, no real progress had been made. He pondered why another area of the OAS might not wish to consider conducting an evaluation of such field efforts and noted that otherwise, it would be pointless for the Committee to produce more documents on the subject.

Dr. Villalta concurred with the comments made. She acknowledged that the IADC had gaps and recalled the circumstances under which it had been adopted during the 9/11 crisis. She shared

her experience in El Salvador where there had been conflict between the Court and the legislature and when the legislature wanted to appeal to the OAS pursuant to the IADC, it was told that the appeal had to come from the Executive branch. Consequently, she suggested acting with caution, in order to strengthen the Charter and avoid missteps.

Dr. Correa recognized this was serious work, and that the proposals went well beyond the Bogota Charter. She agreed that no supranational organization had been created. She felt that the proposals made here should not come from the CJI, but rather should consider the role the charter already has. The sanctions that were proposed would require ratification by the GA to be accepted. She referred to comments made by Dr. Baena Soares to safeguard democracy and wondered whether the measures proposed by the Rapporteur could go against Articles 18, 19 and 20. She thought that the Committee should provide some thoughts on their content and refrain from making proposals as to the powers of the SG. She expressed concern that the proposal could affect the principle of non-intervention, which was so essential to all States.

Dr. Moreno suggested a document that would outline these different positions.

Dr. Salinas replied to the comments by noting that the end result was not yet clear. The topic had been prompted by the former SG and the goal – to strengthen the IADC - was clear. He felt that the Committee would have to at least agree about the proposals even if individual members held different positions. Then the GA would see that there had been a debate. He summarized as follows:

- As to the role of the Committee, he referred to the OAS Charter and noted that it was the progressive development of international law.
- On the point of non-intervention that several members had mentioned, he noted that there had been different positions. He pointed out that international law regulates the relations between States, but that the sovereignty of the state had a limit and that limit was curtailed by international law.
- As to unilateral or multilateral action, he did not agree with the view that the SG has powers but cannot have tools, although clarifying that he respected the other positions that had been presented.
- As to the comments by Dr. Baena Soares regarding the value of education, he agreed it played an essential role, but he noted that the purpose of the work by the Committee was to cover the mechanisms, in order to preserve democracy.
- As to the mechanisms, he said these did not work against the SG, because any mechanism that would be created would have to be limited by the powers of the SG.
- With regard to the meaning of "government," he referred members to previous reports, but agreed that he might need to better explain his intention.

In conclusion, Dr. Salinas noted that the debate had demonstrated important differences of opinion. Some members believed that any mechanism could constitute a breach of non-intervention and he said he had to respect that position. He would, therefore, see how he could advance the discussion to find the minimum common denominator.

Dr. Hernández suggested to the rapporteur that in his next report he might also want to consider the rights of a state in response to sanctions. He noted that Article 21 mentions suspension, which has occurred only once in the case of Honduras, but that the concept was also subject to interpretation. He commented that at the time the OAS did not know what to do and queried whether suspension entailed only the participation of the State in the international organization, or whether it included, for example, suspension of fellowships/scholarships of individuals from the State, etc.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the subject matter Rapporteur, Dr. Hernán Salinas elaborated on his report, document CJI/doc. 537/17, which is a summary of agreements and differences in substance

between them for the purpose of sparking debate and figuring out where the subject will go within the Committee. The Rapporteur explained that the object of the report is to put forward proposals aimed at enhancing the mechanisms of implementation of the Inter-American Democratic Charter and not to interpret said document. Moreover, the output into which the proposal will crystalize has not been determined, in light of the importance of having agreements on the subjects to be addressed. There is a consensus as to the harmony in the interpretation of the powers granted to the Secretary General and there is no need for consent in order to bring to the attention of the States situations that jeopardize the representative democracy of a State, based on an analysis in keeping with Articles 3 and 4. The fundamental differences stem from the explicit nature of the powers of the Secretary General. Likewise, he noted differences as to the need to grant the Secretary General tools through the early warning mechanism or of the purpose of monitoring developments of democracy in the region. To some members, this would trigger a violation of the principle of non-intervention. He stressed the rapporteurship's interest in clarifying some terms of the Inter-American Democratic Charter with regard to situations set forth in Articles 18, 20 and 21.

Dr. Joel Hernández made it clear that it is not about interpreting the Democratic Charter or the OAS Charter, and this enables the Committee to remain strictly within the sphere of the law. As for the content of the Rapporteur's report, he noted the relevance of the items proposed with respect to the analysis of the powers of the Secretary General (both implicit and explicit powers), the explanation of the concepts set forth in the chapter that trigger the sanction mechanism, a complex but important topic. Closed ended definitions and exhaustive lists should not be used. Also, he thought it is important to mention the effects of the sanctions and, in particular, suspension. Regarding the type of outputs, he proposed following the example of the CDI, and producing a document with conclusions and comments. Lastly, he urged the Rapporteur to include the situation of Venezuela, characterized by an assault on some of the legally established branches of government under the Constitution, which involves addressing a current issue.

Dr. Duncan Hollis thanked the Chair for his report. Among the remarks he made, he noted that international organizations have powers that are necessary in order to fulfill their missions. Accordingly, we must determine what the implicit powers of the Organization are and whether the Secretary General has powers in this regard. In the event of conflict with the principle of non-intervention, there must be clarification. Nonetheless, as he understands it, he has not seen conflicts in any of the reports. Issuing a warning to a State does not mean conflict. Lastly, as for the powers, he noted that the political aspects of the situation do not prevent the Committee from assuming a role to enable it to clarify how this is implemented.

Dr. Carlos Mata Prates noted that addressing the topic of democracy is complex, inasmuch as it involves aspects relating to ideologies. He also said we should not ignore the prior contributions made by the Committee on the subject matter. He explained he is unable see the practical aspect of the proposal, in view of the fact that we have not determined the nature of the instrument to be prepared. As for the mission of the OAS Charter and of the Democratic Charter regarding the principles of non-intervention, he called for caution and to eliminate any reference to intervention, whether unilateral or collective in nature. With regard to the powers of the Secretary General, the document should be reworked, but in any case, the objectives we are pursuing in the document must be spelled out.

Dr. Jean-Michel Arrighi explained that it is everyone's obligation to defend representative democracy. He also illustrated the differences between current instruments and those prior to the Inter-American Democratic Charter, which were based on the existence of a coup d'état, situations characterized by four elements:

- A State asks the OAS for help;
- A group of countries thinks that there is a crisis in a country and this country accepts such a statement;
- The existence of a crisis but the country does not accept or ask for help, Article 20 of the Democratic Charter based on events in Fujimori's power grab in Peru;

- When there is no government.

In this context, he also noted that the countries should think about the consequences of setting into motion the mechanisms provided for in said instruments, in particular, when suspension is proposed. For this purpose, he believed that it would be very useful to produce a document that makes a pronouncement on the harmonization of sanctions of the three provisions in force on the subject matter: General Assembly Resolution 1080, proposes partial measures or measures of a different nature; Article 9 in the OAS Charter of the Protocol of Washington, which has not been ratified by all States; and the Inter-American Democratic Charter.

The Rapporteur on the subject expressed his appreciation for the contributions made, and the contribution of Dr. Arrighi. He noted that several topics suggested in his report had not been understood. As to the comments of Dr. Mata Prates, he explained that the type of democracy promoted by the Inter-American system is representative democracy and the elements that make it up are established in Articles 3 and 4. He further noted he had recounted the previous reports of the Committee on those points that he thought were fundamental for the object of his paper, in particular, relating to treatment given by the Committee to the subject of non-intervention and type of democracy, both in origin and exercise. He explained that the objective of his report is to enhance the mechanisms of implementation of the Democratic Charter with respect to Chapter IV, but the instrument to be worked on depends on the type of proposals that are made. As to the subject of non-intervention, he explained that what is being proposed are collective actions that do not clash with unilateral actions. He was grateful for the suggestion about the importance of integrating matters linked to the effects of the sanctions, in addition to defining the implicit powers of the organization and the Secretary General. He also noted the need for a major pronouncement by the rest of the members of the Committee. The defense of democracy is a function of every organ of the Organization and, therefore, the Committee can and should participate in it. As for the effort to harmonize laws, it is relevant, but it should be discussed whether to include it in the report or in another document.

Dr. Carlos Mata thanked the Rapporteur for the proposal of having a document ready in March. He thanked the Secretary for Legal Affairs for its contribution, which adds value to the efforts of the Committee and whose analysis makes it possible to include references to specific legal aspects regarding the situation of Venezuela.

Dr. Joel Hernández acknowledged that Dr. Arrighi's historical account reinforced the meaning of harmonious interpretation between the different instruments of the OAS on the subject matter. States could benefit from the catalogue of options available to them. He thought, in addition to suspension, what is concerning to the actors is also whether or not there are enough votes and the rift it could open between States.

Dr. Duncan Hollis regarded as positive the suggestion of focusing the report not only on implementation of the Democratic Charter, but also on the other instruments available on the subject matter and do so with a joint approach to make it possible to capture the situation in all States of the Organization.

Dr. Elizabeth Villalta thanked Dr. Arrighi for his proposal, and urged conducting a thorough study that leaves no doubts as to the interpretation. This must be a serious job considering that there will great expectations, in particular, if reference to the case of Venezuela is included.

The Rapporteur on the subject Hernán Salinas asked how to approach the work in light of the proposals put forward, along with the new ideas: the suggestions of Dr. Hernández as to the effects of the sanctions, the suggestions of Dr. Arrighi on the harmonization efforts, and the issue of Venezuela.

Dr. Joel Hernández noted that the rapporteurship is at a crucial point for this to take shape in such a way that it facilitates discussion within the Committee. Now the proposals must be written into a document of conclusions, with comments to support them. Adjustments will have to be made in order to include treatment of harmonious interpretation of existing instruments and outline the

different solutions that can come from the OAS and also at the national level as a result of suspension. As to the issue of Venezuela, it urgently requires a statement, and the Committee is empowered to carry out said study, in light of the fact that one of the purposes of the OAS is the defense of democracy.

In response to Dr. Hernández, Dr. Duncan Hollis explained that the intention is to expand the content of the report, so we can clarify and compare the Democratic Charter in light of other mechanisms. Perhaps Venezuela can serve as a case study, not as a report focused on said country.

Dr. Carlos Mata noted that these elements make it possible to develop a document in a format that allows us to move forward in the substantive part not only through the proposals or the study. In defining how to treat it, either though a comparison or harmonization of existing mechanisms, it could enable the analysis of the situation of Venezuela, using a purely legal approach, which would require being careful.

Dr. Juan Cevallos urged approaching the issue by taking into consideration the reality of the situation of Venezuela, in which the final product flows from reflection and analysis from a legal technical point of view.

The Rapporteur expressed appreciation for the discussion and the suggestions made. He noted that the presentation of the proposal is to take place when it is deemed appropriate; he concluded by clarifying that the contributions of the Committee should be timely.

Reports submitted by the Rapporteur, doctor Salinas Burgos, in both sessions, March and August, are included below.

CJI/doc. 524/17

GUIDE FOR A REFLECTION OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON "REPRESENTATIVE DEMOCRACY IN THE AMERICAS" AND THE REPORTS OF THE RAPPORTEUR

(Presented by Dr. Hernán Salinas Burgos)

I. INTRODUCTION

Accepting a suggestion from then-Secretary General José Miguel Insulza during its 85th regular session (Río de Janeiro, August 2014), the Inter-American Juridical Committee (IAJC) decided to include the topic of "Representative democracy in the Americas" on its agenda, appointing the undersigned as the Rapporteur.

The aim of the Rapporteurship is to once again undertake a study designed to draft proposals for improving the legal implementation of the Inter-American Democratic Charter (IADC) in order to strengthen representative democracy in the Hemisphere, taking account of the rich body of work on the subject, both of the IAJC and other bodies of the Organization of American States (OAS), with respect to the implementation of the Charter and the new developments and contemporary challenges to democracy in the region.

In this context, bearing in mind Secretary General Insulza's suggestion and the discussion that took place within the IAJC, the purpose of the Rapporteurship is limited exclusively to analyzing and drafting proposals in relation to the mechanisms for collective action established in Chapter IV of the IADC.

In addition, considering the proposal that the Secretary General expressed in his speech before the IAJC and in various reports presented to the OAS Permanent Council,[1] as well as

1. See: Report of the Secretary General pursuant to resolutions AG/RES. 2114 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)-CP/doc. 4184/07, April 4, 2007; Report of the Secretary General pursuant to operative paragraph 3 of resolution AG/RES. 2480 (XXXIX-O/09)

the fact that the Member States of the OAS have deemed it necessary to maintain the consensuses reached and established in the IADC with respect to shared values, principles, and aspirations, the option of drafting proposals to revise the content and amend the text of Chapter IV has been ruled out.

Along these lines, the Rapporteurship's aims are limited to the formulation of proposals for strengthening the existing mechanisms for improving the application of the IADC and the effectiveness of its collective responses, without amending its text, in keeping with the principle of nonintervention and respecting the national sovereignty of each state.

Accordingly, the Rapporteur has presented three reports: a) an initial preliminary report (86th regular session, Río de Janeiro, March 2015) to describe the main shortcomings, gaps, and potential contradictions that the IADC presents with respect to the mechanisms for collective action in defense of democracy, taking account of the work and deliberations within the IAJC and other OAS bodies, as well as contributions of a scholarly nature. That report additionally outlined proposals that have been made on the subject, without assessing or discussing them exhaustively; b) a second report (Washington, 88th regular session, March 2016) whose objective was to present specific proposals to improve preventive action, without that entailing the amendment of its provisions, based on the shortcomings set forth in the first report on the IADC, in particular, with respect to the preventive aspect of the mechanisms for collective action provided in Chapter IV; c) a third report (89th regular session, Río de Janeiro, October 2016), the purpose of which was to compile and develop the proposals formulated in the second report with respect to the improvement of the IADC's mechanisms for preventive action in defense of democracy, as well as to analyze and draft proposals for determining models or guidelines on what constitute "situations that may affect the development of its democratic political institutional process or the legitimate exercise of power" (Article 18, IADC), "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order" (Article 20, IADC), and "interruption of the democratic order" (Article 21, IADC) of a Member State.

The discussion of the third report and the observations thereto evidenced differences that, as IAJC Chair Fabián Novak stated, warrant further reflection on the part of the IAJC's members.

According to the proposal of this Rapporteur at that discussion, which was accepted by the IAJC, the guide developed below has been prepared in order to assist with this reflection. It puts forward the principal aspects that this reflection, in the opinion of the Rapporteur, should address in order to make progress toward a final outcome on this issue on the IAJC's agenda.

II. REFLECTION POINTS

1. Need to strengthen the IADC's mechanisms for preventive action

An initial reflection point refers to the IAJC's determination regarding the existence of weaknesses in the IADC concerning preventive action and the need to strengthen its mechanisms.

These difficulties have been addressed by the Secretary General in his previously cited 2007 Report to the Permanent Council, in which he stated: "*although it has become the hemispheric benchmark for the preservation of democracy, when the Democratic Charter has been put to the test in existing or potential crisis situations, it has revealed some limitations as to its legal, operational, and preventive scope."*

The Rapporteur agrees with the Secretary General, and finds that this preventive work shows us the challenges and further development that can be obtained from the IADC in its implementation.

Indeed, Articles 17 and 18 of the IADC[2/] only provide the foundations for preventive action. Although this instrument establishes what it defines as "*necessary diplomatic*

"*Promotion and Strengthening of Democracy: Follow-up to the Inter-American Democratic Charter,"* presented before the Permanent Council at the meeting held on May 6, 2010.

2. Article 17 of the IADC states: "*When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening*

initiatives" and "*good offices to foster the restoration of democracy,"* it does not specify any procedure or mechanisms to that end; nor does it authorize the Secretary General to take initiatives in this area. This indicates to us the need to explore better mechanisms of dialogue and for the prevention of breakdowns, to ensure that the IADC is truly a useful and effective instrument for anticipating and containing any weakening of the democratic order and preventing its collapse. All of this seems more urgent today, considering that the threat to democracies, in particular its exercise, today assumes varied forms, and these difficulties and inability to foresee, anticipate, or prevent breakdowns in democratic order limit the effective response capacity of the OAS in support of its Member States when their political process or legitimate exercise of power is at risk.

On the other hand, as its text indicates, the IADC expressly sets forth the procedure that should be followed to sanction the state that has experienced the breakdown in democratic order, and specifically defines the sanction that should be applied.

Sustained and effective preventive action and action to promote democracy precludes the activation of the defensive and punitive mechanisms provided for in the IADC, and therefore avoids the costs that an interruption of the democratic order entails not only for the affected state but also for the Organization. Accordingly, international cooperation takes priority over imposition, complaint, or sanctions.

2. The Secretary General has preventive capacity to safeguard representative democracy

A second topic of reflection concerns the IAJC's determination of whether the Secretary General has the authority to act preventively to safeguard representative democracy.

In our opinion, with regard to the powers of the Secretary General, Chapter IV should be interpreted consistently with the express and implied powers that the OAS Charter grants to the Secretary General. In particular, we can cite Article 110.2 of that instrument, which grants the Secretary General the power to "*bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States,"* in conjunction with the preamble of the Charter, which States that "*representative democracy is an indispensable condition for the stability, peace and development of the region,"* and especially Article 2(b) of the Charter, which establishes that one of the purposes of the OAS is "*to promote and consolidate representative democracy, with due respect for the principle of nonintervention."* All of the above is on the assumption that, as Secretary General Luis Almagro has stated, "*The primary role of the Secretary General of the OAS is to ensure compliance with inter-American standards, beginning with those set out in the Charter and General Assembly resolutions,"*[3] adding that, "*Specifically, the Secretary General must be the guardian of the guiding principles of the system, which include respect for human rights, promotion and strengthening of democracy, and cooperative relations among its members."*[4]

This is legally consistent with the fact that, because the OAS Charter is an international treaty under which the IADC was adopted as a General Assembly resolution, this instrument—especially Chapter IV—cannot be interpreted in a manner that contradicts the establishing treaty, nor as having restricted the powers of the Secretary General and other principal bodies

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and preservation of its democratic system." Article 18 of the IADC provides that: "*When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening."*

3. Letter of May 30, 2016 from the Secretary General to the Chair of the Permanent Council, requesting the convening of said Council for purposes of activating the procedure provided for in Article 20 of the IADC with respect to Venezuela (Document OSG/243-16), p. 124.

4. Ibid.

that have been granted to them by that instrument. This has been affirmed in practice by the OAS.[5/]

A harmonious interpretation of the provisions of the IADC and the aforementioned provisions of the OAS Charter in their context, and the practice of the Organization, tells us that the Secretary General is authorized, without the need for consent from any state, to bring to the attention of the General Assembly or the OAS Permanent Council, any situation which, in his opinion, threatens representative democracy in a Member State, and to take preventive diplomatic steps in that context, in the light of analysis performed pursuant to Articles 3 (essential elements of representative democracy) and 4 (essential components of democracy) of the IADC.[6/]

This preventive action of the Secretary General would be limited by the necessary consent of the affected state in the case of an on-site mission and an objective weighing of the aforementioned essential elements and components of democracy, in keeping with the principle of nonintervention.

3. Granting of tools designed to strengthen the preventive role of the Secretary General and the principle of nonintervention

In the event that we determine, according to the above, that the Secretary General legally possesses the authority to act preventively to safeguard representative democracy, without the need to amend the IADC, the challenge would seem to lie in adding the tools designed to strengthen his preventive action to the abovementioned normative framework. This is all in the context of the implied powers understood to be conferred upon the Secretary

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5. It bears mentioning here what the Secretary General stated in 2012, upon the Permanent Council's examination of the situation of Paraguay pertaining to the removal of President Lugo, where the discussion included sending a mission to Paraguay on the Secretary General's own initiative: "*According to the Charter, the General Secretariat (...) is a central organ of the Organization of American States. And I consider it my duty to comply with that decision. The day they tell me I have to wait for what other organizations will say in order to act, to do my job, I think the Organization will be in very bad shape."* (Minutes of the special meeting of the Permanent Council held on June 26, 2012, CP/ACTA 1857/12, p. 45). He added, "*...I think there is no doubt that the Secretariat can and should seek background information, wherever such information exists."* (Ibid., p. 46). At the same session, the representative from Uruguay stated: "*… I think the Secretary General's statement can settle this situation. Clearly he is empowered by his office, statutorily and under Article 20, Chapter IV, of the Inter-American Charter, to assist, to visit, to use good offices and on-site diplomatic measures – this is undeniable. Therefore, if the Secretary General wishes to visit and conduct that special mission and choose his collaborators, we have no problem with that."* (Ibid., p. 48). In addition, the representative from Mexico asserted, *"... Nevertheless, I want to call the attention of all my colleagues to the statement of fact by the Secretary General. The Secretary General has powers, powers that stem from the founding Charter of our Organization: Article 107 specifically gives the Secretary General, as a central institution, authority to fulfill such tasks as arise from agreements, from decisions of the General Assembly; and one that seems essential to me is Article 110, paragraph 2, establishing his duty to bring to the attention of this Permanent Council such matters as may be of interest to the Permanent Council.."* (Ibid., p. 50).

6. Article 3 of the IADC states: "*Essential elements of representative democracy include,* inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government."*

Article 4 of the IADC states: "*Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.*

The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy."

General, considered inherent to the accomplishment of the aims and objectives of defending representative democracy that the OAS Charter and related instruments have granted to him. The political will and circumstances that allow for the exercise of those powers must also be present.

Prior to identifying what those tools would be, a third reflection point for the IAJC is to determine whether the creation and granting of such tools would violate the principle of nonintervention.

As the IAJC stated in resolution IAJC/RES. I-3/95 of March 23, 1995: "…*The principle of nonintervention and the right of the Member States of the Organization to adopt, on an entirely independent basis, the political, economic and social system considered best suited to their interests, does not exclude their obligation to effectively exercise representative democracy in that system and organization."*

In resolution IAJC/RES. 159 (LXXV-O/9), "*The Essential and Fundamental Elements of Representative Democracy and their Relation to Collective Action within the framework of the Inter-American Democratic Charter,"* the IAJC affirmed the right that every state has to choose, without outside influence, its political, economic, and social system, and to organize itself in a way that serves its own best interests. Nevertheless, it stated that that right was limited by the agreement to respect the essential elements of representative democracy and essential components of its exercise, enumerated in the IADC.

Hence, from the time all of the Member States signed the OAS Charter, and unanimously approved the IADC through a General Assembly resolution, they partially ceded their sovereignty and, by virtue of the general principle of *pacta sunt servanda*, are obligated to respect the commitments assumed in those instruments. If all of the states have reciprocally agreed to meet the minimum requirements of democracy, all are subject to compliance and to the procedures they have accepted, including the powers granted to the OAS to act in view of violations or threats of interruptions of democracy in the inter-American system.

As Dr. Baena Soares has stated, the conflict between the principle of nonintervention and the application of collective measures is a false dilemma because the OAS Member States agreed to the conditions through which this society of nations would carry out its duties in furtherance of peace and in defense of democracy, as established in the political instruments of the inter-American system.[7/]

Indeed, in relation to the principle of nonintervention, the OAS Charter states that, "*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State…"* (Article 19) and that "*No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind"* (Article 20); in the case of the actions in defense of democracy provided for in the IADC, it is not a state that takes them but rather the Organization, with respect for international law.

As Beatriz Ramacciotti has noted: "*Unilateral intervention, in addition to being unlawful, is based on the particular state interests of one or several states. In contrast, pro-democratic collective action favors the interests of all the Member States of the OAS, and of the inter-American community. In this regard, any state has the right to avail itself of the OAS to request a pro-democratic collective action when the legitimate exercise of power or democracy is endangered."*[8/]

In the Rapporteur's opinion, what contradicts the principle of nonintervention is the unilateral action of a state or group of states, but not multilateral action in defense of representative democracy taken by the OAS bodies within the framework of their respective powers.

Therefore, if the Secretary General has express and implied powers that allow him to act preventively in order to safeguard representative democracy, those powers also extend to the

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7. Annual Report of the Inter-American Juridical Committee (IAJC) to the forty-first regular session of the General Assembly (CP/doc.4547/11).

8. RAMACCIOTTI, BEATRIZ M. *Democracia y Derecho Internacional en las Américas.* Córdoba, Argentina: Lerner Ed. S.R.L., 2009, p. 290.

power to provide for procedures and tools that enable him to deploy and carry out those powers effectively, without violating the principle of nonintervention, limited to the consent of the state involved, in particular with respect to on-site missions.

4. Tools or procedures for the more effective performance of the preventive actions of the Secretary General in defense of democracy

A fourth reflection point proposed to the members of the IAJC concerns the need to establish tools or procedures for a more effective implementation of the preventive action of the Secretary General to safeguard representative democracy, and the identification of the most appropriate tools or procedures for that purpose.

The Rapporteur has concluded that although the IADC presents deficiencies and shortcomings in terms of preventive measures, the Secretary General has express and implied powers to perform this function, and that it is necessary to add tools or procedures to strengthen that preventive action.

An initial suggestion of this Rapporteurship is that those tools and procedures should not undermine the powers of the Secretary General or entail the creation of superimposing authorities.

A second proposal is to place those tools and procedures within the purview of the current Secretariat for Strengthening Democracy, which reports to the Secretary General, as a department similar to the one that now exists for electoral observation and cooperation or as a special secretariat within the General Secretariat. Regardless of the structure that is chosen for purposes of facilitating the full exercise of the Secretary General's authority established in Article 110 of the OAS Charter, it should be provided with the necessary resources to gather and receive information about situations that jeopardize democracy or the legitimate exercise of democratic power, of which the different branches of government, political parties, civil society, and others can avail themselves. In this context, it would not be necessary to discuss the proposal made by the Secretary General in his 2007 report to interpret the term "government" to refer to all branches of the state rather than solely the Executive Branch in order to overcome the limitations on the activation of mechanisms for collective action in defense of democracy.

A third proposal is to identify two types of "early alert mechanisms" within these tools or procedures. First, those designed to keep a situation that threatens representative democracy from becoming a true crisis situation, linked to the exercise of preventive diplomacy; and, in addition, mechanisms for the monitoring and evolution of democracy designed to strengthen or consolidate democracy and for the early and timely detection of situations that could potentially place the region's countries at risk.

The first type of mechanisms would involve preventive diplomacy mechanisms like good offices, reporting and observation missions, etc., and if the seriousness of the circumstances so warrants, an *ad hoc* rapporteur could be appointed by agreement or resolution of the Permanent Council or the General Assembly.

With regard to the second type of mechanisms, this Rapporteur proposes the creation of a mechanism for the drafting and presentation of periodic reports by the Office of the Secretary General to the Permanent Council or to the General Assembly on the general status of democracy in the different Member States or on certain essential elements of democracy or components essential to its exercise. Such report would make it possible, from a preventive perspective, to identify the shortcomings of democracy in the region, promote models to assist the countries in strengthening their democratic systems, and establish a dialogue with the pertinent countries with a view to improving the quality of democracy and detecting situations that pose a risk to them.

An alternative mechanism consists of the establishment of a mechanism for peer review whereby the Member States that so desire could submit to the evaluation of their peers in relation to compliance with the provisions of the IADC based on Articles 3 and 4 thereof. This mechanism, designed on the basis of uniform and previously agreed indicators and formats, would also facilitate the identification of shortcomings and, therefore, areas to be strengthened, but giving priority to horizontal cooperation.

In order to avoid undermining or overlapping the powers of the Secretary General, and given that they could potentially entail amendments to the OAS Charter, the Rapporteur has ruled out other permanent mechanisms that would be functionally independent and have their own operating structure, such as a Special Rapporteur or Ombudsperson for Democracy, a High Commissioner for Democracy, or an authority or body of independent experts similar to the Inter-American Commission on Human Rights, without prejudice to the necessary cooperation that must exist between this body and the General Secretariat authorized in the manner proposed, given the unquestionable relationship between human rights and the operation of representative democracy and the rule of law.[9/]

5. Models or guidelines for determining what constitutes in a member state "situations that may affect the development of its democratic political institutional process or the legitimate exercise of power," "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order" and "interruption of the democratic order"

As this Rapporteur stated in his First Preliminary Report, one of the criticisms of the limitations of Chapter IV of the IADC is the "vagueness" of the terms used and the "ambiguity" of criteria for identifying the situations provided for in Articles 18, 20, and 21 of the IADC,[10] which are not defined in that instrument.

In this context, a fifth issue of reflection arises for the IAJC: namely, the need for more precise guidelines and definitions that would more specifically identify the situations in which its action is most foreseeable and OAS action in defense of democracy can therefore be expected. This, together with avoiding leaving the matter to absolute political discretion, would enable the Secretary General and the Member States to invoke the IADC and convene the Permanent Council to collectively examine situations that would seem to be consistent with those provided for in the previously cited articles.

In the opinion of this Rapporteur, the first question that arises in this reflection point is—in the event of going forward in the abovementioned context—what is the advisable course of action, considering the dynamic and evolution of the democratic and institutional processes

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9. Article 7 of the IADC states: "*Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments."*

10. Article 20 of the IADC states: "*In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.*
The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy.
If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter.
The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process."
Article 21 of the IADC provides: "*When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the Member States in accordance with the Charter of the OAS. The suspension shall take effect immediately.*
The suspended Member State shall continue to fulfill its obligations to the Organization, in particular its human rights obligations.
Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that State."

and the need for the implementation of the IADC to adapt to new and unpredictable situations? It bears noting that Pedro Nikken has said in reference to this shortcoming that, "*Conversely, this shortcoming offers the advantage of endowing these mechanisms with certain flexibility and allows attention to concentrate on the mechanisms more than on the objective seriousness of the situation, in order to determine which is the most appropriate for attending to each given case. This is a context that favors the operation of one of the fundamental components of the IDC, namely its gradual nature."*[11]

From that perspective, more than toward the establishment of definitions, the Rapporteur has been inclined toward the enunciation of criteria or guidelines derived from the doctrine and practice of the OAS that, in addition to helping provide greater legal certainty and less discretion with regard to the concepts indicated, have sufficient flexibility to be adapted and applied to new situations, with respect for gradualism in the application and interpretation of the IADC.

The second question on this reflection point is how these guidelines or criteria should be construed. It is the opinion of the Rapporteur that they should be construed in light of the essential elements of democracy established in Article 3 of the IADC and the essential components of its exercise provided in Article 4 of the IADC and other inter-American instruments such as Resolution I of the V Meeting of Consultation of Foreign Ministers of 1959,[12/] considering the quantitative and qualitative seriousness of their violation.

Although the IADC does not define the conceptual distinction between the "essential elements" and "essential components" of democracy, Nikken indicates that, "*The differences must be approached from the angle of the seriousness of the offences being perpetrated against the 'essential elements' or the 'essential components' of democracy. This implies that taken in isolation, a violation of the former would signify a more serious infringement."*[13/] Thus, according to Nikken, each situation provided for in Chapter IV "*must be the object of individual analysis for the purpose of measuring the harm inflicted to democracy, which may result from a single act or from a governmental policy that seriously impairs it or destroys its essence."*[14]

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11. NIKKEN, Pedro. *Analysis of the Basic Conceptual Definitions for the Application of Mechanisms for the Collective Defense of Democracy Provided for in the Inter-American Democratic Charter, in* "Collective Defense of Democracy: Concepts and Procedures," Andean Commission of Jurists, (Series: Diffusion of the Inter-American Democratic Charter 5), Lima 2006, p. 84.

12. The final whereas clause and the operative part of this resolution state that: "*It is advisable to state, with no attempt to be complete, some of the principles and attributes of the democratic system in this Hemisphere, so as to permit national and international public opinion to gauge the degree of identification of political regimes and governments with that system, thus contributing to the eradication of forms of dictatorship, despotism, or tyranny, without weakening respect for the right of peoples freely to choose their own government, Declares: 1. The principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the state. 2. The governments of the American republics should be the result of free elections. 3. Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy. 4. The governments of the American states should maintain a system of freedom for the individual and of social justice based on respect for fundamental human rights. 5. The human rights incorporated into the legislation of the American states should be protected by effective judicial procedures. 6. The systematic use of political prescription is contrary to American democratic order. 7. Freedom of the press, radio, and television, and, in general, freedom of information and expression, are essential conditions for the existence of a democratic regime. 8. The American States, in order to strengthen democratic institutions, should cooperate among themselves within the limits of their resources and the framework of their laws so as to strengthen and develop their economic structure, and achieve just and humane living conditions for their peoples."*

13. NIKKEN, op. cit., p. 40.

14. Ibid., p. 82.

Under this framework, these criteria or guidelines should be based on the premise that violations limited to essential components of the exercise of democracy (Article 4) can only be classified within the situations—depending on their seriousness—of Article 18 or 20 of Chapter IV of the IADC, which does not preclude violations of Article 4 that are added to others of Article 3 relative to essential elements of democracy from being determining factors in considering that the critical point of interruption of the democratic order has been reached. This does not entail establishing as a criterion for differentiating the scenarios for the application of Articles 20 and 21 a distinction between violations of Articles 3 and 4 of the IADC and, therefore, always attributing an "interruption of the democratic order" to the former. Indeed, not every breakdown of the essential elements of democracy necessarily rises to the level of a radical, destructive attack on the democratic order.

The final question put forward in this reflection point refers to specifically determining these guidelines or criteria. On this, the Rapporteur's proposal is as follows:

a. With respect to the provision of Article 18 of the IADC that refers to "*situations that may affect the development of its democratic political institutional process or the legitimate exercise of power in an OAS Member State,"* we understand it as a situation where, in spite of there being a serious violation of the provisions of Articles 3 and 4 of the IADC, the democratic order is only at risk of being altered, and therefore the measures in defense of democracy should be aimed at preventing that alteration from occurring, in order to preserve, consolidate, or strengthen democracy. In this context, and in keeping with OAS practice and doctrine, we find situations characterized by the existence of incidents or acts of insubordination of authority that could destabilize the democratic order, or the existence of a set of facts that could give rise to the erosion of democracy, but that have only been isolated or gradual, and not yet sustained and systematic enough to constitute a situation of alteration of the democratic order.

b. With respect to the provision of Article 20 of the IADC that refers to situations in a member state in which "*an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order,"* we understand this to be a situation adversely affecting the essential elements and components mentioned in Articles 3 and 4 of the IADC, where a critical threshold of seriousness is reached, but that does not rise to the level of "institutional breakdown." This situation would exist, according to the practice and doctrine of the OAS, due to the existence of a government policy designed to violate or evade the Constitution, seriously harming the essential elements of democracy or essential components of its exercise, or of a sustained or systematic erosion of those elements in a gradual, sustained, and systematic manner. This could result from a single, serious act (i.e., dissolution of the judiciary or breakdown of its independence; suppression of freedom of expression; abolition of the subordination of the military to civilian authority without the military assuming control of the state), or from a set of acts that affect various attributes provided for in Articles 3 and 4 (i.e., the systematic violation of human rights, including freedom of expression; the systematic erosion of the principle of the separation of powers through the gradual encroachment on the powers of the legislative branch and the gradual cooptation of the judiciary; the destruction of political pluralism through a perverse electoral system), and can refer to any democratic institutions—that is, all branches of government, political parties, and human rights.

c. With respect to the provision of Article 21 of the IADC that concerns the most serious situation provided for in Chapter IV, "the interruption of the democratic order in a Member State," it is our opinion that this extends to the classic coup d'état, but includes other situations in which the essential elements described in Article 3 of the IADC are severely undermined. Such is the case of "self-coups" [*autogolpes*], so-called "impeachment coups," referring to the abrupt action taken by a legislature to remove the democratically elected president outside the constitutionally established impeachment proceedings, and other situations where there is a break in the democratic order, such as the installation of a single-party regime, or the adoption of an apartheid system. This situation of interruption or breakdown in the democratic order can also arise when a progressive accumulation of events crosses a critical threshold and creates a situation in which the essence of democracy is radically harmed, as would be the case of a government policy that seriously violates human rights, like the systematic practice of forced disappearance of persons, extrajudicial executions, or other serious crimes against human rights, or, in general, when such a policy reveals a

persistent scenario of serious, clear, and reliably proven violations of fundamental rights. This critical point could also be reached through a process that, in practice, evidences the destruction of the independence of the branches of government, or the progressive destruction of an electoral system that guarantees the holding of free and fair elections based on universal suffrage and the secret ballot. It would also not be necessary for the breakdown to be total; it would just have to be essential—that is, it would have to have been eroded to the point where the political system has lost the quality of being democratic. This involves the notion of a critical point at which the threshold of the radical distortion of democracy has been crossed, which can only be evaluated in light of the circumstances of each specific case.

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CJI/doc. 537/17

REPRESENTATIVE DEMOCRACY IN THE AMERICAS

(Presented by Dr. Hernán Salinas Burgos)

Minutes

At the last meeting of the Inter-American Juridical Committee (hereinafter the "Committee"), as rapporteur for the topic "Representative Democracy in the Americas," I presented the "Reflection Guide" (document CJI/doc.524/17 of February 21, 2017), which, as its title suggests, sought, based on the comments and discrepancies that arose on the subject during presentations of past reports, to organize the topic and encourage reflection on the main points that to my mind emerged in its examination and the proposals contained in those reports.

During the discussion of the points raised in the Guide, a number of observations and discrepancies emerged that, in my opinion as rapporteur, necessitate minutes such as these to identify the substantive areas of agreement and disagreement with a view to holding a discussion and determining the ultimate fate of this rapporteurship.

To begin with, it should be recalled that the remit of this rapporteurship—as stated in the mandate approved by the Committee when it included the topic of Representative Democracy in the Americas on its agenda on my recommendation, based on a suggestion by the former Secretary General of the Organization of American States, José Miguel Insulza—is to formulate proposals designed not to interpret the Inter-American Democratic Charter, as was suggested in the discussions at the last meeting, but to improve its juridical implementation in order to strengthen representative democracy in the Hemisphere. At the same time, that remit was confined exclusively to an analysis and the formulation of proposals in relation to the mechanisms for collective action envisaged in Chapter IV of the Inter-American Democratic Charter, without such proposals implying any amendment of that instrument.

Therefore, a number of highly interesting aspects that emerged in the discussions—such as the region's persisting poverty as a factor that amounts to an obstacle to democracy, the need for a social charter in the inter-American system, or the importance of education as a factor for strengthening representative democracy, while undeniably important, are outside the rapporteurship's specific remit. Therefore, the inclusion of the aspects mentioned would require that the Committee reformulate the rapporteurship's mandate.

In addition, the rapporteurship has not outlined an instrument for formulating any proposals that would emerge from its study, which would be premature at this time. Accordingly, no guide has been proposed on the subject, as appeared to be insinuated in the discussion at the last meeting. Rather, as I mentioned, what was proposed was a reflection guide addressing only the substantive areas at issue.

Second, during the discussions at the last meeting, no observations were made on the rapporteurship's opinion to the effect that a harmonious interpretation of the objectives of the OAS Charter in relation to representative democracy and the prerogatives that it accords the Secretary General of the Organization with respect to the provisions of the Inter-American Democratic Charter leads us to the conclusion that the Secretary General is authorized, without need for consent from any State, to bring to the attention of the OAS General Assembly or Permanent Council any situation that in his opinion poses a risk to representative democracy in

a Member State, and to pursue diplomatic efforts in that framework, in light of an analysis conducted taking into account the provisions contained in Articles 3 (essential elements of representative democracy) and 4 (essential components of democracy) of the Inter-American Democratic Charter.

The fundamental differences concern whether or not the Secretary General has, not only the powers expressly granted to him by the OAS Charter in the area of defense of representative democracy, but also implicit but inherent powers for the purposes and objectives of that defense. There are also discrepancies over whether or not there is a need to provide the Secretary General with tools or mechanisms that would strengthen his powers—particularly any preventive ones for the defense of democracy, especially if one considers that the defense of representative democracy applies not only to its origin but also its exercise—such as those suggested by this rapporteurship in previous reports. Indeed, for some members of the Committee that would entail an infringement of the principle of nonintervention. In the opinion of this rapporteurship, only when this key issue is settled will the Committee be able to move forward, if it deems it appropriate to do so, with the question of types of "early warning" mechanisms to be suggested for preventing risks to representative democracy from transforming into actual crises. Such mechanisms would be coupled, on one hand, with efforts in the area of preventive diplomacy and, on the other, with mechanisms to monitor developments in the area of representative democracy aimed at strengthening or consolidating democratic institutions, as well as mechanisms for early and timely detection of potential situations that could present a risk in the region's countries.

In that regard, I would like to reiterate what the Committee has already stated on the subject, that is, that "[d]emocracy is a right of the peoples of the Americas and an international legal obligation of the respective States in the inter-American system, a right and obligation that may be called upon and demanded, respectfully [Tr: *sic*], by and before the Organization of the American States,"[1] and that the right of every State to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, is limited by the undertaking to respect the essential elements of representative democracy and the essential components of its exercise, as spelled out in the Inter-American Democratic Charter (resolution CJI/RES. 159 (LXXV-O/09).

At the same time, it is worth reiterating that all Member States, having signed the Charter of the OAS and unanimously approved the Inter-American Democratic Charter—an instrument that, as Eduardo Vío Grossi, the erstwhile chair of the Committee, stated, *"precisely identifies the international legal nature of democracy, the elements of it that the OAS is called upon to consider, the obligations that states assume for its observance, and the mechanisms that, therefore, it envisages for this promotion and consolidation"*—are required under the principle of *pacta sunt servanda* to comply with the commitments adopted in those instruments. Those commitments include the powers granted to the OAS to act in the face of violations or the threat of interruptions of representative democracy in the inter-American system.

As Committee member Dr. Baena Soares has noted, the conflict between the principle of nonintervention and the enforcement of collective measures is a false dilemma, since the OAS Member States have accepted the conditions whereby this league of nations would perform its duties on behalf of peace and in defense of democracy, as enshrined in the political instruments that make up the inter-American system.[2]

Thus, unlike unilateral intervention, which is illegal, collective action in favor of democracy benefits the interests of all OAS Member States and the inter-American community as a whole, and therefore any state has the right to turn to the OAS to request action of the kind described whenever the legitimate exercise of power or democratic institutions are in jeopardy.

In my opinion, that framework of collective action in favor of democracy extends to the implicit powers—not merely the explicit ones—that the OAS Charter, the Inter-American

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[1] Draft Declaration on the Centenary of the Inter-American Juridical Committee (CJI/doc.195/05, 2005.

[2] Annual Report of the Inter-American Juridical Committee to the General Assembly at its fortieth regular session (CP/doc.4547/11).

Democratic Charter, and the practice of the Organization grant the Secretary General and to any mechanisms or tools that are created to strengthen the preventive measures that he adopts, all in defense of representative democracy. Accordingly, they could not be regarded as violating the principle of nonintervention, provided that they are exercised with the necessary prudence, rationality, and proportionality such as to respect state sovereignty.

In response to criticism regarding the shortcomings of Chapter IV as regards the vagueness of the terms used and the "imprecision" of criteria for determining the situations envisaged in Articles 18, 20, and 21 of the Inter-American Democratic Charter, the Reflection Guide proposes models or guidelines for deciding what constitutes such situations. In that connection, the discussions focused on the need for, or the possibility of, either moving forward with the formulation of criteria to that end, or continuing to use a discretionary approach and making determinations on a case-by-case basis.

Finally, I reiterate that the future direction that this rapporteurship will follow will be shaped by the determinations adopted on the points addressed in these minutes, which seek to reflect the main topics of this study on which discrepancies have emerged. In the opinion of this rapporteurship, only when the above is settled will it be appropriate to move forward with studies on related topics, such as the effects of sanctions and, in particular, the suspension of a Member State under the provisions of Chapter IV of the Inter-American Democratic Charter.

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4. Guide for the Application of the Principle of Conventionality

At the 87th Regular Session of the Inter-American Juridical Committee held in Rio de Janeiro in August 2015, Dr. Ruth Correa Palacio introduced the document "Guide for the Application of the Principle of Conventionality (Preliminary Presentation)" (CJI/doc. 492/15) with a view to its inclusion as a new item on the Committee's agenda.

From the methodological standpoint, she suggested the following steps: send the States a questionnaire to gain insight on the status of the issue from states' point of view; and review decisions adopted by the Inter-American Court of Human Rights and domestic courts.

Dr. Baena Soares expressed concern over the recurring problem of states' lack of response to the Committee's questionnaires.

Dr. Salinas commented on the enforcement of human rights treaties, whose nature precludes their automatic enforcement; he said that there were considerations involving respect for national sovereignty, for example, that have to be taken into account. He noted for the record the fundamental value of that doctrine and recalled the issue of the Protocol of San Salvador and the necessary distinction with respect to its enforcement, given the principle of conventionality. Lastly, he mentioned that the issue of questionnaires was important, but that many states were averse to engage in such exercises. He suggested shortening the questionnaire.

Dr. Moreno Guerra congratulated the Rapporteur for starting from the premise that the constitution cannot be above treaties. If a state has constitutional problems with a particular treaty, it should not accede to it. He acknowledged the relevance of the proposed questions, including the references to the conventions on torture and forced disappearance.

Dr. Stewart mentioned that treaty implementation should take into account all OAS Member States. Second, he urged being sensitive to the particular situation of each state. Finally, he mentioned that in the common law system international treaties are not directly enforceable but require laws or a written rule to enable their implementation.

Dr. Collot suggested that the comparative law methodology be used in Dr. Correa's study.

Dr. Mata Prates said that the first issue to be discussed concerned the principle of conventionality. That entails considering the significance of provisions contained in international treaties, as well as the implementation of the decisions of the Inter-American Court of Human Rights. The latter, necessitates a determination as to whether the *considerando* clauses (preambular paragraphs stating grounds) of a decision impose additional obligations.

Dr. Correa noted that there is nothing ideological about this study; its aim is to examine the status of the matter; moreover, the questions are not designed to analyze the scope of domestic obligations. She also said that she intended to reduce the number of questions and clarify any that have prompted additional queries. She stressed that her study does not cover social and economic rights because their incorporation in her country would require mechanisms other than human rights instruments, owing to their different nature.

Acting as Chair, Dr. Mata Prates noted for the record the agreement of the members and moved to approve the item's inclusion on the agenda of the Inter-American Juridical Committee and designate Dr. Correa as its Rapporteur.

On October 2, 2015, the Secretariat of the Juridical Committee, in accordance with the Committee's request, distributed the questionnaire (document CJI/doc.492/15 rev.1) to the Member States of the Organization.

At the 88th Regular Session of the Inter-American Juridical Committee held in Washington, D.C., in April 2016, Dr. Correa, the Rapporteur for the item "Guide for the application of the principle of conventionality" presented document CJI/doc. 500/16 and reviewed the background on the subject.

She explained that the report was divided into two main parts: the first deals with the concept of conventionality control, while the second sets out her conclusions based on the responses of the

five countries that had answered the questionnaire distributed by the Committee Secretariat (Chile, Colombia, Jamaica, Mexico, and Peru). She mentioned that Guatemala had also answered the questionnaire but its response was not included because it had arrived after she submitted her written report.

With regard to the first part, she highlighted the scope ascribed to the principle by the Inter-American Court of Human Rights based on the following assumptions: either human rights conventions are incorporated into a country's legal system, or convention provisions are observed by the country's judges. She also pointed out that there is a distinction between enforcing convention provisions and the effect that may be accorded to the principle of conventionality.

She noted that conventionality control occurs when a domestic legal provision is rendered ineffective by a treaty-based provision.

She said that conventionality control is usually identified with constitutionality control, since most countries in the Americas incorporate treaty-based provisions on human rights into their domestic system of laws at the constitutional level, falling in step with the conventional block. In that context, such rights also enjoy constitutional rank and can be used to interpret, amend or remove lesser legal provisions, or make them unenforceable. She stressed that such issues have to do with the way in which states express their sovereignty and, therefore, should be taken into account in preparing the guide.

Among the responses received thus far, she noted that all of the countries that had replied were parties to the American Convention, which was not necessarily to say that they had accepted the jurisdiction of the Court. She further noted that, as a rule, in the countries reviewed lawmakers were not taking steps to incorporate the treaties into their domestic legal systems by or assigning them the rank of law, or that of constitutional provision in the case of countries that adopt the constitutional block. In this regard, she emphasized that constitutionality control systems have not been an obstacle to conventionality control, regardless of whether the country has adopted consolidated or diffuse constitutionality control. She also indicated that she had found that the enforcement of international standards serves as justification for domestic judgments, and that there was a perceptible intention on the part of states to apply international standards at the domestic level based on criteria established by the Inter-American Court.

By way of a general conclusion, she observed that it is important to have more information with which to prepare the guide. In that connection, she thanked the Committee Secretariat for its efforts to encourage responses from states on the subject and she asked that another reminder be sent out.

Dr. Salinas urged the Rapporteur to address two issues in her report: (1) the effectiveness of human rights laws and their implementation in the domestic system of law; and (2) the interpretation of constitutional provisions in the light of convention norms, and whether or not the interpretation of the Inter-American Court of Human Rights should be enforced, taking precedence over constitutional norms. He said that the guide should clarify the issue of conventionality control, not so much from the point of view of compliance with the provisions of treaties, but rather with regard to the interpretation of domestic laws in the light of conventions and the interpretations of the Inter-American Court of Human Rights.

Dr. Pichardo referred to the positive contribution that a guide would make in terms of facilitating the efforts of countries to meet their international obligations.

Dr. Stewart observed that the concept is not very well known in the common law tradition. In that regard he asked the Rapporteur if the principle applies only to those countries that have accepted the jurisdiction of the Court and if the principle should be understood as imposing additional obligations; that is, in the sense of making binding the opinions of interpretative international bodies, such as the Committee against Torture. In his opinion, states could take the comments of such international bodies into consideration, but not regard them as binding, despite the fact that some members of such committees regard them as compulsory and binding. As he understood the presentation, the doctrine of conventionality control was apparently even stronger

and entailed a treaty-based obligation to give enforce the interpretations of the Inter-American Court of Human Rights.

Dr. Correa said that Dr. Stewart's questions went to the heart of the matter under consideration and were precisely what she sought to verify in her research. In fact, she stated that she had observed in the Inter-American Court's jurisprudence statements that attribute to the "authorized judicial interpreter" — which in the case of the American Convention on Human Rights would be the Court itself — authority to enforce its decisions and interpretations in all states parties to the Convention, whose standards afford the minimum of protection that is needed. She also mentioned certain pronouncements by the Inter-American Court that would appear to establish an enforcement obligation for all OAS Member States, even ones that are not parties to the American Convention, in cases that concern interpretations in relation to the limits and legal effects of *jus cogens,* bearing in mind the *erga omnes* nature of the rights enshrined by this principle.

Dr. Salinas suggested that these obligations be are compared with principle of the margin of appreciation that derives from state sovereignty.

Dr. Correa called upon her fellow members of the Committee to assist the authorities in their respective countries in responding promptly when the Committee Secretariat sends out another reminder about the questionnaire.

At the 89th Regular Meeting of the Inter-American Juridical Committee, held in Rio de Janeiro in October 2016, the Rapporteur, Dr. Correa, referred to a study carried out by the Inter-American Institute of Human Rights on the subject of conventionality control (Self-training manual for justice operators on enforcement of conventionality control), which has many merits since it explains how the concept evolved in the Inter-American Court of Human Rights.

She also mentioned the importance of receiving states' responses to the questionnaire in order to understand the scope of the principle and the context of its application. She noted that the Committee had only received 10 replies and that the responses of the states of some of the members of the Committee were still pending.

She explained that the purpose of the study is to draft a guide to assess the scope of the issue and states' concept of it.

The Chair mentioned that the following year he would give a course on implementation of the judgments of the Inter-American Court at The Hague Academy of International Law, which had led him to investigate the subject. He also said that he was advising on a doctoral thesis precisely on the subject of conventionality control, the conclusions of which found that there are three different postures that states adopt: (1) compliant; (2) opposed – the Court lacks the authority; and (3) uncertain whether in favor or against.

He said that it is not possible to expect uniformity with regard to what the Court imposes.

He urged the Rapporteur to continue her work despite not having received more responses from states. The 10 responses would allow her to start her report on the subject and begin exploring the lay of the land. He suggested that her report at the next meeting cover the reactions of states to the judgments enforced by the Court.

Dr. Salinas noted that the issue of conventionality control is connected with the interpretation of the American Convention. He inquired which states had responded and if they included states parties to the Convention. If so, he agreed with the Chair and asked if it would be possible to have a report for the next meeting.

Dr. Hernández García noted that a guide for the implementation of this principle would be very important for all states. He explained that there is a directive from the Supreme Court of Mexico that was mandatory for the country's courts and indicated that all courts must judge based on the *pro homine* principle. He said that the challenge for the Rapporteur is to determine the scope of international human rights law. The directive is very broad as it implies the principle of *ex officio* application in addition to the need to rely on the standards underpinning all the court's jurisprudence, which seems excessive. Although the State is bound and the judiciary is part of the

State, the Mexican State should not take part in the development of standards in which it has not played a role. He said that a collegial discussion of the topic could allow the Juridical Committee to adopt conclusions. Finally, he said that he had attended several seminars in which many experts confessed not to understand the foundations of the principle, particularly those from countries of an Anglo-Saxon legal persuasion. Therefore, a guide would be useful to clarify them.

Dr. Mata Prates acknowledged the complexity of the issue and agreed with the opinion of the other members in favor of developing a guide, given its usefulness. He mentioned having attended a seminar on the subject in Uruguay, but from the perspective of constitutional law. In that context, a multitude of opinions were put forward on the subject. For that reason, he said that it was well-nigh impossible to set out a single position on the part of states, since the response was closely bound up with the jurisprudence of each country. Hence, the vital importance of Dr. Correa's work for explaining the various interpretations of the concept of conventionality control.

Dr. Villalta mentioned that protection standards should be sought, not only in the American Convention, but also in other human rights treaties. She recalled the Court's advisory opinion in the Avena case, in which it found that the rights to consular protection contained in the 1963 Vienna Convention had the character of human rights and, therefore, fell under the jurisdiction of the inter-American system.

Dr. Correa emphasized that the Court had decided that the rationale for its decisions should be used to interpret treaty provisions in justifying decisions at the domestic level. She said that the states that had replied were Argentina, Chile, Colombia, Ecuador, Guatemala, Jamaica, Mexico, Panama, Paraguay and Peru. In the case of Jamaica, she said that the response noted that the country did not accept the jurisdiction of the Court, despite being a party to the American Convention. Regarding the issue mentioned by Dr. Villalta, she explained that, in part, the study serves to verify all the elements of the principle's scope. The Court, for example, makes the principle of conventionality control binding upon all states simply by virtue of having signed the American Convention. She expressed concern in that regard, given that the judges' background is in domestic law, not treaty law. She said that it is important to have the opinion of non-signatories of the American Convention; or of countries, such as Jamaica, that are signatories but are not subject to the jurisdiction of the Court. She agreed with working with the information that had been made available but said that it was very important to have the responses of the other States so that a single standard could be advanced, given that this was a self-imposed mandate of the Committee.

Dr. Salinas reiterated that a conceptual definition should be the starting point of the study. Naturally that involved implementing the Court's interpretation; the enforceability of international treaties is a separate matter, however. It is important to know the concept because if we restrict it to the Court's interpretation, then states parties, particularly those subject to the jurisdiction of the Court, will be taken into account, but we would not get a complete overview.

Dr. Hernández García referred to Dr. Correa´s remarks and explained that it was important to have a practical, accessible, and readable document on which they could then offer considerations, which should cover three levels:

1. Link to the jurisdiction of the Court;

2. Link to the regulatory contents of the American Convention; and,

3. Unenforceability of the domestic provision vis-à-vis the international rule.

The Chairman consulted the Rapporteur on ways to avoid the final report being regarded as an extension of powers that do not belong to the Inter-American Juridical Committee, but to the Inter-American Court.

Dr. Correa said that as the document was developed it would be necessary to take the precautions to avoid any clash of competencies. However, she said that the objective is to harmonize criteria for applying principles.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the Rapporteur on the subject, Dr. Ruth Correa, presented her proposal "Guide for the application of the principle of conventionality," document CJI/doc.526/17.

Dr. Mata Prates first noted a limitation in that only 15 States have accepted the jurisdiction of the Court and therefore this guide would not be applicable in the States that have not ratified the Convention. Secondly, the response rate to the questionnaire was not very good and of those States that did respond, only 7 have ratified and acknowledged the jurisdiction of the Court. Likewise, he pointed out that as regards the principle of conventionality, it would be necessary to choose one of the interpretations to validate. He said that if we were to begin from a perspective of hierarchy, we must determine how the Convention would be framed in domestic law and the rank that would be conferred onto it by a domestic judge. For some, the interpretation of the Convention by the Court should be treated as binding legal precedent; however, he said that Uruguay does not keep to that tradition. He asked whether the intention was to include only decisions or also interpretations and, secondly, whether the intention was to extend this provision only to the parties to the Convention or to all States. He was in agreement with item 5 until the second comma and suggested that the clause thereafter be revised to read something like "... and that judges take into account the decisions of the Court." Dr. Mata continued onto item 7 and expressed his agreement only with the middle section, but voiced concern over the way judges would be called upon to interpret law and the reference addressing domestic matters unique to each State. He suggested rewording the part of item 11 relating to supervision of the application of the decisions of the Court, in particular, its follow-up through meetings with the State and the parties.

Dr. Hollis requested further explanation from the Rapporteur about the scope and wondered whether the catalogue was intended to be applied only to States party that have accepted the jurisdiction of the Court or to all OAS Member States. He expressed fear that the guidelines would not align with the domestic laws of some States. By way of example, he explained that, although the United States accepts the principle of *pacta sunt servanda* and the principle that domestic law is no excuse for non-compliance with treaty obligations, the problem arises with "non-self-executing treaties." Implementation of human rights treaties has been left to the legislature, which will determine whether the treaty stands on its own directly or whether new or existing legislation will be required. Under non-self-executing treaties, the domestic judge is not allowed to apply the treaty provisions directly and must apply domestic law. That approach is different from the one seen in other States. Dr. Hollis pondered whether the guidelines were intended for monist States that accept international law as predominant or for dualist States that put domestic law above international law. He asserted that for dualist States, the guidelines would be problematic and referred specifically to item 5, which grants binding nature to interpretations of the courts and he suggested instead language such as "...with due regard to..." He moved on to items 6 and 7, and suggested adding an explanation to limit the guidelines to those States that would be able to apply conventionality.

Dr. Hernández agreed with the question raised by both Dr. Mata and Dr. Hollis regarding whether or not the guidelines are directed to all States or only the 15 that have accepted the jurisdiction of the Court. He noted that even those 15 States would each have a different interpretation of the principle of conventionality and suggested it would be useful to provide a definition. On this issue, he compared the title of the document with the title of the attached Guide and noted that the scope of the guidelines related more to domestic implementation. He turned to item 5 and said that in some States, such as Mexico, the interpretations used by the Supreme Court are not limited to those cases where Mexico has been a party, but includes application of all jurisprudence. On this score, he said, the proposal to observe the interpretation of the Inter-American Court would not be realistic in a judicial system as complex as Mexico's. Dr. Hernández concluded by pondering whether the purpose of this work should be addressing the intended meaning of the concept of conventionality, in light of the different understandings of the concept.

Dr. Baena Soares complimented the Rapporteur for her clarity. He thought that training for a parallel group could cause problems and suggested that it would be more acceptable if said training were made available to everyone. He also posed the question of who would be the target audience

of the guide. He assumed it would only be States party to the Convention, but he felt that non-party States could also benefit from a guide.

Dr. Villalta thanked the Rapporteur for selection of this topic. She recalled her experiences with courts in El Salvador and noted that in many OAS States, judges were unaware of rulings by the Court or the conventions in force. She stressed that judicial training was paramount. She agreed with Dr. Mata Prates's comments on items 5, 7 and 11. Regarding item 13 on the creation of an institution, she requested clarification on how it would function, especially given that not all States are parties to the American Convention.

Dr. Moreno congratulated the women on the Committee on the occasion of International Women's Day. He also said that, based his experience, guides are often used to explain provisions of PIL. As to item 5, he reiterated concerns that had been raised earlier over position in the hierarchy and suggested that this be further explained.

The Chair began his remarks by addressing the lack of a definition of the core concept. He said that one aspect would be less controversial and could be solved by the law of treaties, inasmuch as all human rights adhere to the principle of *pacta sunt servanda*. It means that States must fulfill their obligations and must in good faith adopt the necessary legal measures to make it feasible, by doing away with internal obstacles, in keeping with the Vienna Convention on the Law of Treaties. Secondly, there is a concept running through the rulings of the Court on the relative effect of the principle under examination. According to the European Court, this becomes more complex and highly controversial if national courts are required to take into account the jurisprudence of the Court. If we exempt those that are not parties, then we also exempt those that have not accepted jurisdiction of the Court; and hence the scope of application would be reduced even further. In his view, the principle of conventionality should be seen as a means towards fulfillment of treaties, not as an end in and of itself, given that most States do not consider the judgments of the Court as mandatory. Lastly, he asked the Rapporteur to start by crafting a definition that would serve as the start of a path to follow.

The Rapporteur responded by thanking everyone for the rich input. She asked members to recall the discussion with the legal advisors as to the importance and currency of this topic. She reminded the plenary that this was her second report and that the discussions on the definitions were reflected in the first one. She said that this concept did not come from the rapporteurship, but was instead based on precepts previously used by the Court. She thought it was clear that the objective was not simply to apply the Convention, but also to use the interpretations as a basis for rulings. In response to the question of the intended audience, she said it could be split into two groups. The first group is based on the recommendation that all OAS Member States should ratify the Convention, i.e. it consists of countries that have not ratified the instrument. The second group consists of countries that have ratified it. Thirdly, she explained that reference to the concept that interpretations be treated as binding was only for those States that had accepted the Court's jurisdiction. The paper is geared toward the second theory, which would not only include parties to the decision but also those that had accepted the Court's jurisdiction. It is obvious that such a differentiation leads to a clear conclusion that the decision is binding only on the parties and those that have accepted jurisdiction. Not only are there binding effects, but the Court is allowed to interpret. That is the conformity principle of interpretation and is intended to be taken into account by States. The Rapporteur finished by stating that the purpose was to recommend follow-up for those States that have ratified the Convention and nothing more. She said that in many States - Mexico, Peru, Colombia- judges are talking about conventionality and not only in the higher courts. As to item 10, the intention is that training should be made available to all administrative officials – not only judges – including those in charge of protecting human rights and interpreting the decisions of the Court. She said that this is closely connected to access to justice.

Dr. Villalta suggested, with the support of Dr. Moreno, changing the title to "Recommendations" rather than "Guidelines."

Dr. Hernández referred to the citation of the case from Peru (footnote 1 of the report) and asked whether this was a principle from a Court decision that had general acceptance. If so, he suggested that there may be variations from state to state. He said it was important to clarify the interpretations and the jurisprudential interpretations as a whole.

Regarding the content of the recommendations, he agreed that the first recommendation was clear and valid: the call for ratification. But he clarified that, at the end of the day, it is a sovereign decision. At that point, he suggested differentiating between those States party (25) and those that recognize the jurisdiction of the Court (15). This would make the guide much easier to follow.

Dr. Mata Prates endorsed the suggestion of Dr. Hernández to change the first part in order to look at different positions regarding the scope of the principle of conventionality. Then the Committee could continue with the recommendations, such as calling for the ratification of the Convention and recognition of the jurisdiction of the Court. In regard to the jurisprudence of the Court, he requested being cautious because constitutional aspects play an important role in the way each State brings decisions into its domestic law. It is essential for jurisprudence to be known not only by judges, but also by the administration.

Dr. Hollis agreed with the first recommendation and said that it would actually be useful to him in his rapporteurship. He then stressed the importance of the language being more specific and expressed his intention to leave it to the discretion of the Rapporteur whether to include a third section.

Dr. Villalta agreed with the recommendation about training, as there is generally a lack of knowledge about all human rights instruments – not just the Inter-American ones.

The Chairman agreed with the point raised by Dr. Hernández concerning acceptance by States of the jurisdiction of the Court and that the Committee could only invite and not recommend.

Secondly, he said in-depth study was important for fine-tuning the principle of conventionality and its application by human rights courts. He proposed including the discussion on compliance with judgments as well as rulings (as precedents) of the European Union Court. He thought it also important to cover the sovereignty of States and to refer, for example, to the empowerment of the state regarding compatibility with domestic laws. Thus, he proposed making additional efforts, due to the complexity and importance of the topic, to secure responses from the States that have not responded.

The Chair suggested the Rapporteur prepare a new report for the upcoming session, and closed discussion on the topic.

On March 30, the Technical Secretariat of the Committee sent out a reminder to the States that have not responded to the questionnaire.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the topic was not considered.

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5. On-line Arbitration Arising from Cross-border Consumer Transactions

Documents

CJI/doc. 523/17 corr.1	On-line arbitration and consumer protection in the Americas (Presented by Dr. José Antonio Moreno Rodríguez)
CJI/doc. 544/17	On-line arbitration arising from cross-border consumer transactions (Presented by Dr. Ana Elizabeth Villalta Vizcarra)
DDI/doc.7/17	On-line arbitration arising from cross-border consumer transactions (Presented by the Department of International Law)

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), Dr. Stewart submitted the document entitled "Private International Law: Consumer Protection", CJI/doc. 498/16, whereby he proposes to add to the Committee's agenda the issue of consumer protection, considering the continued interest that States and Private International lawyers have in this issue, as attested in the roundtable held on April 4th, 2016. In this regard, he proposed to revisit the matter in order to make a contribution which may result in an analytical guide, principles or recommendations.

Dr. Moreno supported Dr. Stewart's initiative and stated that there have been major developments on the issue internationally in the last ten years since the proposal of the Convention on Consumer Protection, which was examined at the CIDIP-VII.

Dr. Villalta also supported Dr. Stewart's proposal, and suggested working on the preparation of a guide.

Dr. Salinas concurred with respect to the importance of the issue, but opposed deciding on the nature of final instrument to be drafted at this time without holding further discussions on the issue. He suggested that Dr. Moreno join the project as a Rapporteur, given his specialization in Private International Law.

Dr. Correa concurred in supporting the inclusion of the issue on the Committee's agenda. Indeed, she noted that several of the issues proposed at the roundtable are related precisely to consumer protection.

Dr. Collot also expressed his interest in participating in the discussion of the issue and in confirming the role of the CARICOM countries.

Dr. Hernández García joined the consensus that was formed with regard to the inclusion of the issue on the agenda for the next session, to be held in October 2016, and supported the appointment of Dr. Moreno as Rapporteur together with Dr. Stewart.

Dr. Moreno stated that he accepted the task of joining the team of Rapporteurs and suggested including Dr. Villalta, who expressed her thanks and her interest in participating as a Rapporteur.

The Vice-Chairman recalled the events of the CIDIP-VII with regard to consumer protection, and therefore agreed that it was advisable to draft a set of guiding principles at this time. Immediately thereafter, the inclusion of the issue on the agenda was approved, as well as the appointment of the four Rapporteurs: Moreno, Villalta, Stewart, and Collot. Dr. Villalta observed that the presence of the four Rapporteurs allows for all of the regions of the Americas to be represented. The Rapporteurs agreed to submit a document in the next session with their views on the matter.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Dr. Stewart submitted a new document entitled "Private International Law: Consumer Protection", CJI/doc. 504/16. Dr. Collot on his turn, presented document "Consumer Protection in Caribbean Community Law: Thoughts about The Revised Treaty of Chaguaramas (RTC)", CJI/doc. 508/16. In order to facilitate discussion of the topic, the Committee created a working group during the second week of its session, made up of the four Rapporteurs, who after several meetings submitted a draft resolution on international consumer protection urging the States

to establish mechanisms of international coordination and cooperation, in addition to recognizing the need for consumer protection. This proposal also includes a new mandate to continue to address this topic on the Committee's agenda from the standpoint of "online settlement of disputes arising from cross-border consumer transactions." The plenary accepted the resolution unanimously and decided to forward document CJI/RES. 227/16 (LXXXXIX-O/16) to the Permanent Council.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the Rapporteur on the topic, Dr. José Moreno, provided a short background explanation as to how the topic arose in the Committee. He explained that the majority of the States in the Americas have already modernized their legislation on arbitration, courts have clearly accepted this trend and arbitration rulings are recognized. What is needed now is a legislative change so that consumer relations are also covered. Colombia has issued a new law that could serve as a model law and he suggested that the Committee could move forward in this way. In this context, he asked the plenary to decide whether a model law should be developed for quick and effective solutions. For this mission, he proposed as an approach, reaching out to consumer protection institutions, such as UNCITRAL in the UN sphere, and also national level institutions, such as the FTC, on consumer protection in the United States, as well as Colombia and Brazil, for potential use of their laws to craft a quality model law.

Dr. Mata Prates responded to footnote 1 of the report, which notes Uruguay as one of the States that had yet to modernize its legislation. He reported that a draft bill was in the making and was expected to be approved either this year or the next.

The Chair found the topic very important and meaningful to the region. Regarding protection of consumer rights, he said it was important to consider a broad range of alternatives, which would allow quicker development of a better product. He also endorsed the suggestion to gain support from other bodies, such as UNCITRAL, etc.

Dr. Correa said this topic is linked to the work of Dr. Villalta on international arbitration. She expressed her agreement that the option of online arbitration had to be accepted by the purchaser at the time of the sale and that for logistical reasons this rule has not been followed. She supported the preparation of a draft model law or regulation, because this problem was common to all countries of the world.

Dr. Villalta noted that consumers remain unprotected in their relations and that there is no convention on consumer protection. Thus, this work might serve to protect the weaker party. She noted that we are all consumers and it would be important to consumers for such mechanisms to be available.

Dr. Moreno commented that the New York Convention on Arbitration has 150 ratifications and is considered the biggest success of commercial law at the international level. He proposed preparing a product that could be made available soon and asked Dr. Villalta whether she was willing to work with him as joint rapporteur and she accepted. Moreover, he requested changing the title of the topic as follows: "Online arbitration arising from cross-border consumer transactions."

The Chair asked Dr. Moreno to submit a report in the future, whereby he closed debate on this topic.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), Dr. Villalta presented a brief report, document CJI/doc.544/17, describing efforts by the Department of International Law to gather information on the practice of online arbitration arising from cross-border consumer transactions, document DDI/doc. 7/2017. This document includes background information on the topic, developments among national and international entities, which have implemented norms on the subject of consumer protection, such as the United Nations Conference on Trade and Development, the United Nations Commission on International Trade Law, and the Organization for Cooperation and Economic Development. In the national sphere, reference is made to laws in Colombia, Brazil, Mexico and the United States, as well as the norms of the European Union on the subject matter, highlighting online dispute resolution

initiatives. Lastly, mention is made of private mechanisms of dispute settlement, proposed by *eBay* and the *Better Business Bureau*. The Department of International Law's document concludes by listing lessons learned.

At the end of her presentation, Dr. Villalta urged establishing a uniform system that could be based on the European Union's online dispute settlement system in order to enhance consumer protection.

Dr. José Moreno, in turn, provided background information on the topic of consumer law in the CIDIP-VII. He explained in this regard that the option of online arbitration appears to be an area that could be useful to the operators of the region, and he noted that the work of the Department of International Law has been essential. The majority of the countries of the region have ratified the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," and in fact many have brought their arbitration laws in line with these norms. Therefore, it would be important to assess whether this type of legislation would be sufficient to cover consumer protection. Another option would be to issue model regulations or guidelines with regard to online disputes.

Dr. Dante Negro explained the document prepared by the Department of International Law, whose origin was a specific mandate of the Committee. While the norms that apply to arbitration, consumers and online trading have broad coverage, he noted that none of these norms addresses the cases of consumer transactions. He cited in this regard situations of failed online purchase transactions that would involve a high number of cases, but that at the individual level there is no incentive to file claims because of the obstacles and costs it entails. He concluded by stressing that the mechanisms of online settlement offer the possibility of evaluating the situation of the weakest party.

In the view of Dr. Ruth Correa, lack of territoriality of these types of transaction means that the analysis thereof must be approached from a access to justice perspective as a topic of public law. She cited the case of Colombia, where an offer of a compromise clause was thought up, allowing the purchaser to use the arbitral ruling to the extent that he accepts the aforementioned arbitral clause. Notwithstanding, she noted that the online arbitration mechanism has not been implemented. She suggested a legislative guide be drafted in the Committee.

Dr. Duncan Hollis appreciated the report presented by the Rapporteur. He proposed taking into consideration the issue of the relationship between private mechanisms and legal dispute resolution mechanisms, in particular, when many of these mechanisms do not allow for a sufficient remedy.

The Chair deemed it appropriate to conduct a prior fact-based study to explain, among other things, whether there are instruments on the subject matter and then decide about the need to move forward; the diagnostic assessment should have a bearing on the decision to address the topic.

Dr. José Moreno noted that there were no subject matter experts on the Committee in this area and, therefore, it was necessary to resort to institutions such as the *American Arbitration Association* to get more input. He stated that the document of the Department of International Law should be circulated to the members. As for Dr. Hollis's proposal, one possibility would be to explore the available ways forward in cases wherein the individuals do not accept the settlement proposed by the private companies.

The Chair noted that because there is not sufficient background information available, further exploration is in order.

Dr. Joel Hernández endorsed the idea of conducting further searches. He also proposed that the online private companies' dispute settlement should not be the subject of the study, but that the scope should cover State intervention when the parties have exhausted their own mechanisms. Additionally, any study should be confined to cross-border consumption, and not deal in issues of a domestic nature. Lastly, he suggested producing model regulations or a legislative guide that is useful.

Dr. Moreno undertook to follow up on the topic through a supplementary cross-border study. As far as he is concerned, the nature of the instrument would be determined at a later time.

Reports submitted by doctors José A. Moreno Rodríguez and Ana Elizabeth Villalta Vizcarra, as well as the Document elaborated by the Department of International Law are included below.

CJI/doc.523/17 corr.1

ON-LINE ARBITRATION AND CONSUMER PROTECTION IN THE AMERICAS

(Presented by Dr. José Antonio Moreno Rodríguez)

INTRODUCTION

Electronic commerce, or e-commerce, uses information and communication technologies (ICTs) as a means to enter into and fulfill contracts, or solely to enter into the same.

E-commerce writ large encompasses sales and service provision contracts, whether domestic or international, which stem from the interaction between the three principal parties that intervene therein: government, businesses, and consumers.

The virtual environment in which e-commerce takes place is likely to cause mistrust, especially in B2C transactions—i.e., those which involve a business and a consumer. The mistrust increases when the transaction is of an international nature.

One of the reasons that explains this mistrust is the uncertainty about what to do or where to turn if a dispute arises between the parties involved. On top of this, in the case of international transactions, there is the concern with the costs that litigating abroad would entail.

Therefore, to incentivize e-commerce, legal certainty must be strengthened. In addition to improving levels of certainty and predictability, this will allow for sustained, ongoing vigilance in order to prevent implementation of new ICTs that could weaken on-line legal certainty.

In this sense, on-inline dispute resolution (ODR) mechanisms are an effective method for resolving disputes stemming from on-line transactions, which the parties can resort to without leaving the electronic environment in which they have decided to establish their business relationships.

ODR is the result of a combination of alternative dispute resolution (ADR) methods with ICTs. Although ODR includes different dispute resolution methods, which at the same time are constantly evolving and undergoing change, this report focuses on electronic arbitration (e-arbitration), as one of the most frequently used ODR mechanisms.

Below, existing legislation in Latin America on arbitration and e-arbitration are analyzed (I), followed by suggestions regarding matters that require additional legislation (II).

I. Arbitration and E-arbitration Legislation in Latin America

In addition to the United States and Canada, which already had appropriate arbitration rules, numerous countries in the Americas have modernized their legislation on arbitration.[1] In

[1.] For example, Bolivia, Law 1770; Brazil, Law 9307 of 1997; Costa Rica, Decree Law 7727 of 1997; Cuba, Decree Law 250 of 2007; Chile, Law 19971 of 2004; Ecuador, Arbitration and Mediation Law of 1997; El Salvador, Legislative Decree 914 of 2002; Guatemala, Decree Law 67 of 1995; Honduras, Decree Law 161-2000; Nicaragua, Law 540 of 2005; Panama, Decree Law 5 of 1999; Peru, Decree Law 1071 of 2008; Paraguay, Law 1879 of 2002; Dominican Republic, Law 489 of 2008, and Venezuela, Commercial Arbitration Law of 2008. Notable exceptions are Argentina and Uruguay.

most cases, the new laws were inspired by the Model Law on International Commercial Arbitration, issued by the United Nations Commission on International Trade Law (UNCITRAL).[2] Additionally, practically all countries in the Americas have ratified the New York Convention.

Thus, although currently there is a whole host of laws on arbitration, the same cannot be said for e-arbitration.

To date, there is no global or regional treaty or convention—nor any domestic law applicable in Latin America—which regulates ODR methods, among them, e-arbitration.

II. Suggestions

We believe that, for purposes of promoting the use of e-commerce through strengthening of legal certainty, it is vital to regulate e-arbitration as a dispute resolution mechanism appropriate for the virtual environment in which transactions unfold.

There are two options. The first is to use the existing provisions of international rules and of applicable law. The second is to create new provisions specifically adapted to e-arbitration.

Given that there is some uniformity in arbitration legislation in Latin America, an assessment should be conducted of what adjustments thereto would be relevant so they can be applied to e-arbitration proceedings.

Additionally, this will necessarily require additional legislation that provides for procedural rules specifically designed for electronic proceedings.

We will refer below to some issues that should be considered in stand-alone legislation on e-arbitration or when adapting already existing arbitration rules to the on-line environment.

1. The legislation should provide for a clear and simple process that includes recourse to on-line arbitration, such that vendors or service providers cannot elude their responsibilities with regard to purchasers or unsatisfied beneficiaries;
2. How much procedural activity would have to be done online for the arbitration to be considered electronic should be determined.
3. The legislation should provide for the creation of an arbitration center that furnishes the e-arbitration service and has an on-line dispute resolution platform.
4. Whether e-arbitration will only be available for disputes arising from on-line transactions–which would be studied and resolved in the same virtual environment in which the contractual relationship between the parties was established–or whether it could also be applied to disputes that have arisen in an "offline" contract should be determined.
5. Whether e-arbitration would only apply to disputes stemming from transactions involving foreign elements should be determined.
6. A way to determine the language to be used in the arbitration, if the parties have not agreed upon one, should be established.
7. Applicable law. The exercise of the contracting parties' autonomous will should be promoted. Where parties have not chosen the law applicable to a potential dispute, and each country's private international law is going to be applicable, there should be appropriate rules in this respect. This issue could be evaluated and included in the international contracts guide being drafted by the OAS Inter-American Juridical Committee.

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[2] In keeping with the UNCITRAL website, legislation based on the Model Law on International Commercial Arbitration has been enacted in Chile, Costa Rica, Paraguay, Peru, Venezuela, Dominican Republic, Nicaragua, Honduras, Guatemala, and Mexico. http://www.uncitral.org/uncitral/es/uncitral_texts/arbitration/1985Model_arbitration_status.html

8. Awards issued electronically should be recognized and enforced in keeping with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

CJI/doc.544/17

ONLINE ARBITRATION ARISING FROM CROSS-BORDER CONSUMER TRANSACTIONS

(Presented by Dr. Ana Elizabeth Villalta Vizcarra)

The document presented by the Department of International Law of the Organization of the American States (OAS), is an excellent report and a magnificent review of the relevant work of international organizations and other entities. The document refers to the antecedents on the theme and later mentions international initiatives, including the Organization of the United Nations through the guidelines provided by the General Assembly on the theme of Protection of the Consumer. Other organizations include the United Nations Conference on Trade and Development (UNCTAD) which set up an Inter-governmental Group within which was established an Inter-governmental Group of Experts in law and the policy of Protection of the Consumer to promote an "institutional international mechanism", likewise through the United Nations Committee for International Maritime Law (CNUDMI), which adopted the Technical Notes on On-line Settlement of Disputes; the Organization for Cooperation and Economic Development (OECD), through its Committee on Consumer Policy provides a platform for governments and interested parties to work together on the analysis of consumer problems and its *International Consumer Protection and Enforcement Network (ICPEN)*, an organization of authorities on consumer protection designed to share information on transnational trade activities that affect the interests of consumers and to foster international cooperation and collaboration .

The above-mentioned document refers to national initiatives and to the *US Federal Trade Commission, International Consumer Protection*, which includes an office of international affairs embracing international protection of consumers and also deals with policies that promote the choice of the consumer and support security for the consumer in the international market with a focus on electronic trade and emerging technologies; the American Arbitration Association (AAA) has developed arbitrage rules for consumption to be applied to the arbitrage clauses in contracts between individual consumers and providers under specific circumstances.

The document referred to is related to the national legislation on protection of the consumer of some Member States of the OAS, including Colombia, which has law 1480 (2011) on consumer protection; Brazil, which through its National Secretariat for the Consumer (SENACON) attached to the Ministry of Justice, is the entity responsible for the mechanism of alternative settlement of disputes, created in 2014 by a Municipal Regulation establishing a free public-utility system of alternative settlement of disputes for the purpose of promoting protection of the consumer through direct interaction between consumer and provider to reduce disputes; Mexico has offered consumers an ODR online dispute resolution platform since 2008 called Concilianet, which is operated by the Federal Agency for Consumer Protection (PROFECO) and where the conciliation hearings are launched via internet with those providers of goods and services who for this purpose that have adhered to the collaboration agreement with the office of the General Attorney (the consumer in turn must register his personal identity information and provide digital documents to support his claim); and the United States, which has a federal law requiring credit- and debit-card companies to allow reimbursement of payment.

Then the document refers to other regions, among them the European Union, which has approved a Directive on Alternative Dispute Resolution on consumption and the Online Dispute Resolution Regulation (ODR), also referring to consumption, both of which are seen

as the two interconnected and complementary legal instruments. Consumers are able to file their claims online in any of the 23 official languages of the European Union.

Finally, the document refers to Private Mechanisms, among them the eBay, which is one of the largest purchasing networks offering ODR (online dispute resolution) to clients. However, several dispute-resolution methodologies in this mechanism are only applicable to eBay purchasers in the United States of America; in addition, the *Better Business Bureau (BBB)* is an organization that coordinates the BBB independent network throughout Canada, the United States and Mexico, and offers ODR systems to resolve consumer claims, and can be extended to face-to-face and also virtual transactions.

To conclude, a paragraph on relevant lessons learned, referring to the importance of requesting an online Global ODR system for the resolution of disputes related to cross-border consumption transactions.

In this regard, when analyzing such an important document on Online Arbitration in cross-border consumption transaction, we are led to reflect on the convenience of analyzing all these international and domestic initiatives, and also private mechanisms, in order to devise a proper system applicable to the American region facilitating consumer resolution of cross-border disputes through ODR systems, and the creation of an Inter-American ODR System for the resolution of disputes related to cross-border consumption transactions in the region.

In this regard it would be highly convenient for the Inter-American Juridical Committee to draft such a mechanism for the American region, and setting up an Inter-American ODR System based on all the initiatives included in the Working Document of the OAS Department of International Law, taking into consideration that the CIDIP-VII (Specialized Inter-American Conferences on International Private Law) was unable to adopt the Project of Inter-American Convention for the Protection of Consumers, with the aim of benefitting the weaker part in a consumption relationship. Furthermore, the instrument on an Inter-American ODR System should respect the specific peculiarities of the region *vis-à-vis* cross-border consumption relationships.

With this online system for dispute resolution of cross-border consumption transactions in the region, a great number of consumers will benefit, thereby ensuring the international protection of consumers.

* * *

DDI/doc.7/17

ON-LINE ARBITRATION ARISING FROM CROSS-BORDER CONSUMER TRANSACTIONS: COMPILATION OF RELEVANT WORK BY INTERNATIONAL ORGANIZATIONS AND OTHER ENTITIES

(Document prepared by the Department of International Law[*])

INTRODUCTION

This compilation of work by other organizations relevant to "On-line Arbitration Arising from Cross-Border Consumer Transactions" has been prepared by the Department of International Law in its capacity as technical secretariat to the Inter-American Juridical Committee ("CJI") to assist the co-rapporteurs currently assigned to this topic, Dra. Elizabeth Villalta and Dr. José Moreno, and other CJI members.

The topic that had originated as "International Consumer Protection" was added to the agenda of the CJI during its 88th Regular Session held in April 2016 at the initiative of Dr.

[*] The Annexes referenced in this document (Annexes I-V) are available in electronic format only.

David Stewart with the support of other members;[1] it was noted at that time that there had been major developments on the issue internationally in the ten years since the matter had been examined at CIDIP-VII.[2] At its subsequent 89th Regular Session, the CJI adopted a resolution (document CJI/RES. 277) that it forwarded to the Permanent Council in which it resolved, *inter alia*, "to focus its efforts on issues relating to mechanisms for online settlement of disputes arising from cross-border consumer transactions." Accordingly, during its 90th Regular Session held in March 2017, the CJI decided to modify the title to correspond with the topic as so circumscribed. At the most recent OAS General Assembly, Member States took note of the importance of CJI/RES. 227, "which underscores the frequent need for special consumer protection in cross-border transactions and the importance of establishing mechanisms for international cooperation and for coordination in the area of consumer protection."[3] Member States also resolved "to reaffirm the importance of and support for the Inter-American Program for the Development of International Law" and "to instruct the Department of International Law, as part of the activities provided for in the Inter-American Program… to report on the work of the Inter-American Juridical Committee, including, *inter alia*,… international consumer protection."[4]

The following excerpt from a recent article, while somewhat lengthy, is offered here by way of summary and introduction.

> "Disputes arising in the online context can vary considerably and are often extremely difficult for courts to handle for a number of reasons, including: the high volume of claims, the contrast between the low value of the transaction and the high cost of litigation, the question of applicable law (in both e-commerce and consumer protection contexts), and the difficulty of enforcement of foreign judgments. For years, courts all over the world have been promoting the use of Alternative Dispute Resolution (ADR) as an effective, and even preferred, substitute for litigation. ADR has been praised for its speed, flexibility, informality, and its solution-oriented (as opposed to blame-oriented) approach to conflict resolution. However, traditional ADR methods, such as arbitration, have proven to be less than helpful tools for addressing the complications inherent in judicial resolution of web-based transactional disputes.
>
> "Unlike other dispute resolution processes, ODR is a fast, efficient, flexible, and inexpensive mechanism for handling e-commerce disputes, both at the domestic level and across borders. ODR processes provide businesses and consumers with a simple and reliable process through which to resolve conflicts arising out of their online interactions. ODR works the way the internet works, with resolutions built directly into websites and transaction flows, as opposed to being imposed by a central judicial authority that is completely separate from the online environment where the issue arose. ODR is also cross-jurisdictional and independent of any single set of laws or regulations, which is a better fit with the global nature of the internet. ODR offers clear benefits to both buyers and sellers: consumers appreciate the ability to get their issues resolved quickly and painlessly, and merchants like how consumers are more willing to make purchases (and pay higher prices) when they know a fair and painless resolution

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[1] Dr. Stewart submitted the document entitled "Private International Law: Consumer Protection", CJI/doc. 498/16, wherein he had proposed to add to the CJI agenda the issue of consumer protection, considering the continued interest of States and legal experts in private international law ("PIL"), as had been attested in the PIL roundtable held on April 4th, 2016. Annual Report of the [CJI] to the General Assembly, OEA/Ser. Q, CJI/doc. 521/16, October 13, 2016, at page 90.

[2] *Id.*

[3] Advancing Hemispheric Initiatives on Integral Development, AG/RES. 2904 (XLVII-O/17), (Adopted at the first plenary session, held on June 20, 2017), Part III. Capacity Building, Consumer Protection, para. 3.

[4] International Law, AG/RES. 2909 (XLVII-O/17), (Adopted at the third plenary session, held on June 21, 2017), Part I. Activities of the Committee on Juridical and Political Affairs, Item i. Inter-American Program for the Development of International Law, paras. 1 and 2.

process is available to them. ODR also unlocks new demand from cross-border buyers who might have been averse to making purchases outside of their home geography without a clear resolution process. In essence, ODR is the best approach to providing redress and justice on the internet."[5]

There does not yet appear to be a definition of ODR that can be assumed to be uniformly accepted. While for some it may mean the online equivalent of Alternative Dispute Settlement ("ADR"), it can also include additional mechanisms that are made possible with Information and Communication Technology ("ICT"); it has been suggested that "ODR was born from the synergy between ADR and ICT, as a method for resolving disputes that were arising online and for which traditional means of dispute resolution were inefficient or unavailable."[6]

The following provides a brief overview of relevant legislative texts and other initiatives currently underway at other organizations.

PART I

INTERNATIONAL INITIATIVES

A. International Organizations and Associations

1. United Nations – General Assembly

As was acknowledged in CJI/RES 277, in 2015 the UN General Assembly adopted revised guidelines on consumer protection that now extend to include e-commerce.[7] The guidelines, which were last updated in 1999, call upon Member States to establish national policies for consumer protection that include, *inter alia*, "availability of effective consumer dispute resolution and redress" and "a level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce."[8] In that regard, Member States are encouraged to consider relevant international guidelines and standards on e-commerce and specific mention is made of the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, discussed below.[9]

2. United Nations Conference on Trade and Development ("UNCTAD")

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[5] Del Duca, Louise, *et al*., (2012), Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law), 1 Penn. St. J.L. & Int'l. Aff. 59, at page 62.
Available at: http://elibrary.law.psu.edu/jlia/vol1/iss1/4

[6] https://en.wikipedia.org/wiki/Online_dispute_resolution (Date of access: 7 July 2017), Citing Katsh, E. *et al.*, (2001), Online Dispute Resolution: Resolving Conflicts in Cyberspace (San Francisco, Jossey-Bass).
Other terms used include Internet Dispute Resolution ("iDR"), Electronic Dispute Resolution ("EDR"), Electronic ADR ("eADR") and Online ADR ("oADR"), but ODR has emerged as the most commonly used term. It has been noted that "it is uncertain whether these processes form a new discipline of ADR or a tool to aid existing methods of dispute resolution. The most appropriate view would be to view ODR as an interdisciplinary field of dispute resolution." *Id.*

[7] Consumer Protection, Resolution adopted by the UN General Assembly 22 December 2015, A/RES/70/186. Annex: UN Guidelines for Consumer Protection. See Section I: Electronic Commerce, paras 63-65.
Available at:
https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/449/10/PDF/N1544910.pdf?OpenElement

[8] *Id*, para. 5, subparagraphs (f) and (j), respectively. See also Section F: Dispute Resolution and Redress, generally, and specifically para. 37, which states that "Member States should encourage the development of fair, effective, transparent and impartial mechanisms to address consumer complaints through administrative, judicial and alternative dispute resolution, including for cross-border cases."

[9] *Id.*, para. 65.

Pursuant to the aforementioned resolution, the UN GA established an Intergovernmental Group of Experts on Consumer Protection Law and Policy within the framework of UNCTAD to provide "the international institutional machinery" for the furtherance of these guidelines on consumer protection.[10] The first meeting of that Group of Experts was held in 2016,[11] the second was scheduled to be held in July 2017; a comprehensive note prepared for that meeting contains information on the latest developments in consumer protection, including dispute resolution and redress and cross-border online transactions.[12]

UNCTAD has also conducted research into laws of a number of states and notes that the type and extent of legislation varies significantly. Whereas some countries rely on general civil law to address e-commerce issues (e.g., El Salvador, Mexico and Peru), others have special provisions on e-commerce in consumer protection laws (e.g., Chile, Colombia, United States).[13] Of 119 countries for which UNCTAD has available data, 93 (of which 58 are developing countries or countries with economies in transition) have adopted consumer protection legislation related to e-commerce.[14]

UNCTAD has also developed soft law tools that include a Manual on Consumer Protection; the latest 2016 version now includes a chapter on e-commerce "for the first time."[15] The Manual includes extensive review of the aforementioned 2015 UN consumer protection guidelines.[16]

3. United Nations Commission on International Trade Law ("UNCITRAL")

At its 49th session held in 2016, the UNCITRAL Commission adopted Technical Notes on Online Dispute Resolution.[17] Although the Notes are non-binding, in the operative paragraphs of its decision, the Commission recommends that States use the Notes in designing and implementing ODR systems for cross-border commercial transactions and requests States to support their promotion and use.[18]

In the Notes overview it is recognized that ODR encompasses a broad range of approaches and forms (including ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others) and that the purpose of the Notes is to foster the development of ODR.[19] Section II outlines the principles that underpin any ODR process, specifically fairness, transparency, due process and accountability. Section III outlines the stages of an ODR proceeding, namely negotiation, facilitated settlement and the final stage; principles for each of these three stages are developed in Sections VII, VIII and IX, respectively. Section V includes definitions, roles and responsibilities, and communications; Section VI addresses commencement of ODR proceedings, and Section X

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[10] *Id*., Resolution, operative para. 7 and Guidelines, Section VII. International institutional machinery, para. 95.

[11] UNCTAD, Report of the Intergovernmental Group of Experts on Consumer Protection Law and Policy on its First Session. TD/B/C.I/CPLP/4, 28 December 2016.
Available at: http://unctad.org/meetings/en/SessionalDocuments/cicplpd4_en.pdf

[12] UNCTAD, Consumer protection in electronic commerce, Note by the Secretariat. TD/B/C.I/CPLP/7, 24 April 2017. For dispute resolution, see paras. 37-40 and for redress, see paras 41-45.
Available at: http://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf

[13] *Id*., para. 56.

[14] *Id*., para. 57.

[15] *Id*., para. 73.

[16] UNCTAD (2016). Manual on Consumer Protection (Advance Copy).
Available at: http://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf

[17] UNCITRAL, Report of [UNCITRAL] on its 49th Session (27 June-15 July, 2016) A/71/17. The Technical Notes were adopted as they appear in Annex I to the Report. It was requested that the text of the Technical Notes be published and disseminated. See paras. 216- 217.
Available at:
https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/048/29/PDF/V1604829.pdf?OpenElement

[18] *Id*., para. 217.

[19] *Id*., Technical Notes on ODR, Annex I, paras 2 and 3.

addresses the appointment, powers and functions of "the neutral." Given the significant relevance of these Notes to any potential work by the CJI on this topic, the Notes have been attached as Annex I (in electronic form only).

Having adopted these Notes, the Commission agreed that no further legislative activity should be planned on the topic.[20]

4. Organization for Economic Co-operation and Development ("OECD")

The OECD, through its Committee on Consumer Policy, provides a platform for governments and stakeholders to work together for the analysis of consumer problems and appropriate policy measures.[21] In relation to consumer ODR, the two most relevant recommendations and as had been noted in the UN GA resolution on consumer protection above, are the following:

Consumer Dispute Resolution and Redress:[22]

This Recommendation provides governments with a framework to help consumers resolve disputes and settle claims with business. It covers disputes in both domestic and cross-border transactions and was developed to deal with issues arising from the rapid growth in e-commerce, although it is also applicable to traditional types of purchases.

The Recommendation focuses on five priority areas: identifying basic elements needed for effective domestic resolution and redress; improving resolution of cross-border disputes; enhancing the scope and effectiveness of private sector initiatives to resolve disputes; developing information for monitoring developments and trends in consumer complaints; and improving consumer and business education and awareness on ways to avoid and handle disputes.

Consumer Protection in E-commerce:[23]

With this most recent revision, the OECD "modernized its approach to fair business practices, information disclosures, payment protections, unsafe products, dispute resolution, enforcement and education." The 2016 revisions built upon earlier preparatory work that included specific policy guidance on mobile and online payments and intangible digital content products.

Section F on Dispute Resolution and Redress follows below:

43. Consumers should be provided with meaningful access to fair, easy-to-use, transparent and effective mechanisms to resolve domestic and cross-border e-commerce disputes in a timely manner and obtain redress, as appropriate, without incurring unnecessary cost or burden. These should include out-of-court mechanisms, such as internal complaints handling and alternative dispute resolution (hereafter, "ADR"). Subject to applicable law, the use of such out-of-court mechanisms should not prevent consumers from pursuing other forms of dispute resolution and redress.

44. The development by businesses of internal complaints handling mechanisms, which enable consumers to informally resolve their complaints directly with businesses, at the earliest possible stage, without charge, should be encouraged.

45. Consumers should have access to ADR mechanisms, including online dispute resolution systems, to facilitate the resolution of claims over e-commerce transactions, with special attention to low value or cross-border transactions. Although such mechanisms may be financially supported in a variety of ways, they should be designed to provide dispute resolution on an objective, impartial, and consistent basis, with individual outcomes independent of influence by those providing financial or other support.

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[20] *Id.*, para. 352.

[21] For further information, see: http://www.oecd.org/sti/consumer/

[22] Adopted 12 July 2007.
Available at: http://www.oecd.org/sti/ieconomy/38960101.pdf

[23] OECD (2016), Consumer Protection in E-commerce: OECD Recommendation, OECD Publishing, Paris. (Revised 24 March 2016)
Available at: http://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf

46. Businesses should provide redress to consumers for the harm that they suffer as a consequence of goods or services which, for example, are defective, damage their devices, do not meet advertised quality criteria or where there have been delivery problems. Governments and stakeholders should consider how to provide redress to consumers in appropriate circumstances involving non-monetary transactions.

47. Governments and stakeholders should work towards ensuring that consumer protection enforcement authorities and other relevant bodies, such as consumer organizations, and self-regulatory organizations that handle consumer complaints, have the ability to take action and obtain or facilitate redress for consumers, including monetary redress.

5. International Consumer Protection and Enforcement Network ("ICPEN")[24]

ICPEN is an organization of consumer protection authorities "to share information about cross-border commercial activities that may affect consumer interests and to encourage international cooperation and collaboration." As at June 2017, its membership included 58 countries (plus a few observers that include organizations such as UNCTAD).

It also provides consumer resources that include basic information on how to resolve a national or cross-border consumer dispute.[25] One of its initiatives is **econsumer.gov**, a partnership among 35 of its Member States, whereby consumers can report cross-border complaints "and learn about alternative ways to resolve disputes"; members can share and access this consumer complaint database to help identify and prevent misleading, deceptive or fraudulent practices that cross international borders.

The ICPEN website also provides links to consumer protection entities around the world, many of which are members and some of which have been reviewed above. These include the following: OECD, UNCTAD, European Consumer Centre Network ("ECC-Net"), APEC Electronic Steering Group ("AECSG"), Iberoamerican Forum of Consumer Protection Agencies ("FIAGC"), ASEAN Coordinating Committee on Consumer Protection ("ACCCP"), Unsolicited Communications Enforcement Network ("UCENet"), Global Privacy Enforcement Network ("GPEN") and Consumers International.

B. Domestic Entities

1. US Federal Trade Commission, International Consumer Protection[26]

Within the US Federal Trade Commission, the Office of International Affairs encompasses International Consumer Protection; work by the FTC in this area includes development of "policies that promote consumer choice and encourage consumer confidence in the international marketplace, with a focus on e-commerce and emerging technologies."[27] For policy work in respect of the latter, the website explains that the FTC participates in the OECD Committee on Consumer Policy and the Working Party on Information Security and Privacy, the APEC Electronic Commerce Steering Group and its Data Privacy Subgroup, and the APEC Telecommunication and Information Working Group. There does not appear to be any information specifically related to ODR, apart from mention that the FTC supports econsumer.gov, which was explained above.

2. American Arbitration Association ("AAA")

The AAA has developed Consumer Arbitration Rules that it will apply to arbitration clauses in agreements between individual consumers and businesses under specified circumstances.[28] The latest version does not appear to make any specific reference to ODR.

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[24] https://www.icpen.org/

[25] https://www.icpen.org/resolve-dispute

[26] For further information, see: https://www.ftc.gov/policy/international/international-consumer-protection

[27] https://www.ftc.gov/about-ftc/bureaus-offices/office-international-affairs

[28] AAA Consumer Arbitration Rules. Effective September 1, 2014.
Available at: https://www.adr.org/sites/default/files/Consumer%20Rules.pdf

PART II

DOMESTIC LEGISLATION

A. OAS Member States

1. Colombia

a) ODR

Colombia's Consumer Protection Act, No. 1480 of 2011, by operation of Article 43, paragraph 12, essentially prohibits mandatory arbitration clauses for consumers (such clauses are rendered inoperative or unlawful).

With that contextual background, it is necessary to consider Decree 1829 of August 27, 2013, the main purpose of which is to regulate the establishment of arbitration (and conciliation) centers and which also regulates procedures for dispute resolution by these alternative means. The Decree cites Colombia's Law No. 527 of 1999, which defines e-commerce, and thereby extends the provisions of the Decree also to consumer contracts that have been concluded electronically. Some of the significant provisions are the following:

- Article 80 - in any contract and in particular, an adhesion contract, an optional arbitration clause may be included; it must be clear and included upon completion of the contractual agreement.
- Article 81 - outlines the aspects that may be addressed by the arbitration agreement, including 1) elements that may be arbitrated; 2) appointment of arbitrator; 3) place of arbitration; 4) length of arbitration term; 5) procedure;
  - procedural aspects make reference to "virtual arbitration", "virtual audience" "virtual means"
- Article 2 – defines "virtual arbitration" (roughly translated as a mode of arbitration in which the procedure is administered with support of an information system, application or platform and in which the procedural acts and communications of the parties are supplied through it."
- Article 8 – prescribes the required elements to be addressed by the Rules of Procedure of the Arbitration Centers, and which may also include rules of procedure for virtual arbitration.
- Chapter IV, Articles 18 through 23 – these articles govern the use of Information Technology and Communications and Virtual Arbitration, specifically:
  - Article 18 - authorizes the use of electronic media in all arbitration proceedings without requirement for prior authorization
  - Article 19 – authorizes notifications by electronic means
  - Article 20 – provides for a list of arbitrators that may be specifically dedicated to this form of arbitration
  - Article 21 – authorizes all communications between the parties and the neutral by electronic means
  - Article 22 – authorizes hearings by videoconference, teleconference or other means of simultaneous communication (and for conservation of records)
  - Article 23 – provisions are applicable throughout the national territory

Given the significant relevance of these provisions to any potential work by the CJI on this topic, the Decree has been attached as Annex II (in electronic form only, in Spanish only).

Colombia's Ministry of Justice administers the official website for alternative dispute resolution (http://conciliacion.gov.co/portal) which contains portals for arbitration, conciliation and "the honest broker" (amigable composición). Each portal provides a link to

the supporting legislation (i.e., for arbitration – Law No. 1563 of 2012) and to relevant definitions (i.e., virtual arbitration and virtual conciliation). However, the website itself does not appear to function as an ODR platform at the present time, unlike those of Mexico and Brazil, described below.

b) Chargebacks[29]

Colombia's Decree No. 587 of 2016 has amended Article 51 of the aforementioned Consumer Protection Act, No. 1480 of 2011 to enable chargebacks. Essentially, it enables reversal of payment in the context of any transaction that takes place between consumer and supplier, provided that the supplier and the payment instrument are domiciled in Colombia, but limits application to those consumer transactions carried out by means of electronic commerce (such as Internet, PSE or call center, or any other telesales mechanism or virtual store) and where payment has been made by credit card, debit card, or any other electronic payment instrument. Participants shall reverse payments as requested by the consumer under the following circumstances: 1) consumer has been victim of fraud; 2) transaction was not authorized; 3) product was not received; 4) product delivered does not correspond to product ordered; 5) productive is defective.

Given the significant relevance of these provisions to any potential work by the CJI on this topic, the Decree has been attached as Annex III (in electronic form only, in Spanish only).

2. Brazil

In Brazil, the National Consumer Secretariat (SENACON) of the Ministry of Justice is responsible for the ODR mechanism (www.consumidor.gov.br) that was created in 2014 by Ministerial Ordinance.[30] It was established as provided in Article 1, described as a system of ADR of gratuitous nature and public utility with the purpose of promoting consumer protection through direct interaction between consumers and suppliers to reduce consumer conflicts.[31] The objectives of the ODR mechanism are to increase customer service, prevent conduct that violates consumer rights, promote transparency in consumer relations, provide the state with information necessary to elaborate and implement consumer protection policies, and encourage competitiveness by improving quality and customer service.[32] The ODR mechanism is managed through SENACON with support of the Advisory Committee and Technical Committees that comprise consumer protection agencies and participating suppliers.[33] The Ordinance has been attached as Annex IV (in electronic form only, Portuguese only).

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[29] A "chargeback" is the return of funds to a consumer by the issuer of the credit or debit card that was used to make a purchase or settle a debt. It is considered a type of dispute resolution procedure that is initiated by the consumer if an issue arises after the purchase of goods or services where the purchase has been made by a credit or debit card, either in person or online. Rather than contacting the seller, the consumer initiates the chargeback by contacting the issuer of the credit or debit card and filing a complaint. If the issuer considers the claim is valid, the funds will be "charged back" from the seller's account to the consumer's account. The threat of chargeback is considered to act as an incentive for sellers to provide quality goods and services, and timely refunds. Reasons for chargebacks fall generally into one of four categories: 1) Technical: Expired authorization, non-sufficient funds, or bank processing error; 2) Clerical: Duplicate billing, incorrect amount billed, or refund never issued; 3) Quality: Consumer claims to have never received the goods as promised at the time of purchase; 4) Fraud: Consumer claims they did not authorize the purchase or identity theft. Although each issuer adheres to its own rules, the general process for chargebacks used by all companies is very similar.
See: https://chargebacks911.com/chargebacks/; https://en.wikipedia.org/wiki/Chargeback (Date of Access: 7 July 2017).

[30] Ordinance MJ nº 1.184, of 07.01.2014 - DOU 01.02.2014 - Ministry of Justice. Institutes the system of alternative solution of conflicts.

[31] *Id*., Article 1

[32] *Id*., Article 2.

[33] *Id*., Articles 3-5.

The aforementioned objectives of greater transparency and competitiveness are furthered through the website's publication of the ODR results, which can be searched by company, percentages of resolutions, consumer satisfaction and timeliness. Once a supplier has registered, consumers may choose to initiate a claim either through the ODR mechanism or conventional means of conflict resolution. Consumers can also suggest use of the ODR mechanism to suppliers not yet registered.

To resolve a dispute with a registered supplier, the consumer must submit a claim on the ODR platform, whereupon the supplier is granted a 10-day period for response. The consumer then has a period of up to 20 days to accept the response, to classify the claim as "Resolved" or "Not Resolved" and to indicate the level of satisfaction with the company. The procedure is completed in its entirety over the internet through use of the ODR mechanism, while leaving the option of conventional dispute resolution means open to the consumer. It has been reported that 80 per cent of complaints are currently conciliated and consumer complaints are satisfied on average within 7 days.[34]

3. Mexico

Mexico offers consumers an ODR platform called Concilianet operated by the Federal Consumer Protection Agency ("Profeco").[35] Said to be the first program of its kind in Latin America, Concilianet was launched in 2008 with a pilot phase and participation of only two suppliers; as of 2009 the program has been in full national deployment, now with a wide range of participating suppliers.[36] By this ODR mechanism, conciliation hearings are launched via internet with those suppliers of goods or services that have entered into a collaboration agreement for this purpose with the office of the Attorney General. The consumer must register with personal identification information and provide digitized documentation to support the claim.[37] As indicated on the website, PROFECO will respond within 5 to 10 days after receiving a response from the supplier and will arrange a virtual conciliation hearing between the consumer, the supplier and conciliator. The ODR mechanism is free of charge to consumers for matters of nonconformity in a consumer relationship, such as breach of warranty or contractual clause; it does not address "damages." Provisions for use are set out for both suppliers and consumers that are signed by all participating providers and accepted by consumers upon submitting their complaint.[38]

The Concilianet procedure and dispute resolution module is based on the Federal Law of Consumer Protection (LFPC) and reforms of 2004.[39] The LFPC provides in articles 99, 104 and 111 for the possibility of receiving complaints, providing notifications and discontinuing the procedure by electronic means. These key provisions are summarized below and the full text of certain key provisions of the LFPC is attached as Annex V (in Spanish only).

ARTICLE 99 - The Attorney General will receive the complaints or claims of consumers individually or in groups based on this law, which complaints may be submitted in written, oral, telephonic, electronic or any other means complying with the following requirements…

ARTICLE 104 - Notifications ...

In actions other than those mentioned above, notifications may be made by …and may also be effected by telegram, fax, electronic or other similar means upon written acceptance of the interested party.

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[34] UNCTAD, Note by the Secretariat, *supra* note 9, Box 6, page 11.

[35] https://concilianet.profeco.gob.mx/Concilianet/

[36] Suppliers that have registered are listed by sector; for example, participating airlines include Aeroméxico, LAN, VivaAerobus, AERomar, Taca, CopaAir, American Airlines and Alaska Airlines.

[37] The website provides assurance that PROFECO protects the personal data provided by consumers and suppliers according to Guidelines for the Protection of Personal Data issued by Mexico's National Institute of Transparency, Access to Information and Protection of Personal Data.

[38] https://concilianet.profeco.gob.mx/Concilianet/disposiciones_consumidor.jsp
https://concilianet.profeco.gob.mx/Concilianet/disposiciones_proveedor.jsp

[39] http://www.diputados.gob.mx/LeyesBiblio/ref/lfpc.htm

Documentation that is sent by an administrative unit of the Office of the Attorney General via electronic, fax or other suitable means to another unit of the same for the purposes of its notification, will have full validity provided that the receiving unit has confirmed the identification key of the public server that sends the documentation and that it is kept intact, unaltered and accessible for consultation.

ARTICLE 111 - [Conciliation]

The conciliation may be held by telephone or other suitable means, in which case the Office of the Attorney General or the parties may request that the commitments made be confirmed in writing.

4. United States

In the United States, federal law requires credit and debit card companies to allow chargebacks; reversal rights for credit cards are provided pursuant to Regulation Z of the Truth in Lending Act and for debit cards by Regulation E of the Electronic Fund Transfer Act. The system varies slightly with each credit company but the claims for which chargebacks are allowed are generally the same – non-delivery, non-conforming goods, charges after cancellation or duplicate charges.

B. Other Regions

1. European Union

The EU Directive on consumer ADR[40] and the EU Regulation on consumer ODR[41] have been described as "two interlinked and complementary legislative instruments." The Regulation established an ODR platform that offers consumers and traders simple, low-cost, out-of-court dispute settlement by a single point of entry to ADR entities linked to the platform. As the availability of quality ADR entities is a precondition for the proper functioning of the ODR platform, the Directive seeks to ensure that consumers have access to ADR; it applies to disputes between consumers and traders concerning contractual obligations stemming from sales or services contracts, both online and offline, in all economic sectors, with a few exemptions.[42] EU Member States communicate through competent authorities their list of national dispute resolution bodies to the European Commission.

Businesses established in the EU that sell goods or services to consumers online are required to comply with the ADR/ODR legislation. Accordingly, online traders must inform consumers of the dispute resolution body by which they are covered and should do this on their websites and in the general terms and conditions of sales or service contracts. They are also required to provide a link from their website to the EU's ODR platform.

Consumers can submit their disputes online in any of the 23 official languages of the EU. The ODR platform transmits the disputes only to those dispute resolution bodies that have been communicated by Member States. National contact points that can provide assistance to users are also available on the ODR platform, which has been available to consumers and traders since February 2016.[43]

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[40] Directive 2013/11/EU (21 May 2013) on alternative dispute resolution for consumer disputes ("Directive on consumer ADR") Official Journal of the European Union, L 165/63, 18.6.2013.
Available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF

[41] Regulation 524/2013 (21 May 2013) on online dispute resolution for consumer disputes (Regulation on consumer ODR") Official Journal of the European Union, L 165/1, 18.6.2013.
Available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF

[42] EU Directive, *supra* note 37, preambulatory para. 16.

[43] http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm. This website includes a great deal of helpful information about the ODR platform.

PART III

PRIVATE MECHANISMS

1. eBay

eBay is one of the large online shopping networks that offers its customers ODR services. Currently, SquareTrade is described as "eBay's preferred dispute resolution provider", which offers two services: 1) a free, web-based forum whereby users attempt to resolve disputes on their own, or; 2) the use of a professional mediator at the cost of $15 to the consumer.[44]

In relation to an earlier dispute resolution mechanism that eBay had introduced in 2009, it was noted that it was applicable only to consumers who bought items from the U.S. eBay site, used an eligible payment method, and only to a claim based on a "good faith dispute" between the buyer and seller of "goods."[45] Information as to the applicability of eBay's current mechanism to cross-border buyers and sellers was not pursued at this time.

Other large online sellers, such as Amazon, etc., have similar ODR mechanisms.

2. Better Business Bureau ("BBB")

The Council of Better Business Bureaus describes itself as the umbrella organization for the network of independent BBBs throughout the United States, Canada and Mexico and is also "home to its national and international programs on dispute resolution…"[46] It offers an ODR system to handle consumer complaints "that relate to marketplace issues experienced with the services or products a business provides" (presumably extends to in-person and online transactions).[47]

PART IV

LESSONS LEARNED

Experts who have examined various forms of ODR have developed recommendations on what should be required in a "global ODR system", that is, a global system for online resolution of disputes related to cross-border e-commerce transactions. These are as follows:[48]

- Minimum Common ODR rules and standards for ODR providers and neutrals, such as the work of UNCITRAL Working Group III (i.e., Technical Notes that were subsequently adopted by the Commission in 2016);
- Cross-border ODR infrastructure interconnecting all ODR stakeholders; and
- Available way to set up and incorporate the Minimum Common ODR Rules and the Cross-Border ODR Interconnecting Infrastructure Rules while at the same time supporting the establishment of various ODR programs on a global or regional basis competing and complementing one another.

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[44] The website indicates that eBay will subsidize the rest of the cost. More details available at: http://pages.ebay.com/services/buyandsell/disputeres.html
[45] Del Duca, *supra* note 2, at 65.
[46] https://www.bbb.org/council/about/council-of-better-business-bureaus/
[47] https://www.bbb.org/consumer-complaints/file-a-complaint/get-started
[48] Del Duca, *supra* note 2, at 74.

6. Binding and non-binding agreements

Document

CJI/doc. 542/17 corr.1	Preliminary report on binding and non-binding agreements (Presented by Dr. Duncan B. Hollis)

At the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Duncan B. Hollis expressed his willingness to work on the issue of agreements and the process by which decisions are taken at the domestic level by a state on a binding *vs*. non-binding instrument. The plenary agreed with the proposal, the topic was added to the agenda, and Dr. Hollis was designated as the Rapporteur.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the Rapporteur on the subject, Dr. Duncan Hollis, was pleased to present this report, which focused on four elements: differentiation, capacity, effects and procedures. The topic of differentiation involves identifying and distinguishing between three categories of commitments in the international context. On this score, he highlighted three ways of undertaking international commitments and defined each one: treaties, contracts and political agreements. In order to ascertain its nature, it must be determined whether the instrument is binding and, if so, whether it is a treaty or a contract. If the nature of the instrument is not expressly stated, there may be indications of the authors' intent, such as the structure of the texts and the wording used to express consent in undertaking an obligation, the appointment of a trustee, etc. Every case must be analyzed on an individual basis because of the specificity of each instrument. In the view of the Rapporteur, there is a presumption that these documents are best if they are binding. The Rapporteur also expressed his preference for treaties when choosing between them and contracts. As for the topic of capacity to enter into treaties, he explained that even though this is a power of the sovereignty of States, there is no clarity regarding who may represent the State or act as its proxy in entering into treaties. Although it is a practice in the United States and Canada for agencies to obtain authorization of representation, in countries such as Egypt and South Africa government agencies lack such capacity. In this regard, current practice seems to be that recognition of government agencies is based on the internal consent of the State and the external consent of the counterpart. He also posited differences between Federal States, citing the example of Canada, whose distribution of competencies grants the province of Quebec certain powers in the international sphere, which the Argentine Constitution does not grant its provinces. As for municipal agencies, he gave the example of the authorization granted to municipalities in Mexico to undertake obligations. The Rapporteur underscored as problematic the widespread practice of unauthorized agreements between agencies of different countries.

The Rapporteur explained that political commitments render limitations on capacity inapplicable in binding agreements. As to the effect of instruments, he cited as the main element respect for the principle of *pacta sunt servanda* and, therefore, overriding effects lie in the terms themselves. In this context, he recognized three main sources: the law of treaties, acts of retorsion and the law of State responsibility. Political agreements, he further explained, are not subject to any particular regime and the law of treaties and the provisions of State responsibility are not applicable to them. However, they may have political effects and, sometimes, though they are not binding, they could indirectly have legal effects. There is variation in domestic procedures to terminate an instrument and the way States authorize binding and non-binding agreements. States almost universally assign the task to the executive branch, assign the approval procedure to the legislative branch and, in some instances, include judicial review. Few countries have no checks in place on the executive by other branches of government. In the United States, the procedure provides for the Department of State to act as a check on the agency or federal or municipal branch (Circular 175). As for political agreements, it is difficult to obtain information on the full range of procedures, the number of instruments, the type, the subjects and the obligations pursued.

He concluded his presentation by proposing a menu of options with regard to the road map as to what to expect from the report in terms of general principles, responsibilities and best practices. In this context, he proposed drafting queries for the governments by means of questionnaire to learn each State's practice and asked the members their opinion about whether this should be done, mainly because of the lack of information on States' practices.

The Chairman regarded as highly important the paper the Rapporteur presented, which had been introduced originally at the meeting of the legal advisors, who should be participating at some point in the discussion on the subject along with the others.

Dr. Hernández expressed his appreciation for the document and the verbal presentation, and stressed the importance of a joint effort because of the many different areas involved. By way of example, he mentioned the diversity of procedures for implementation of treaties at the domestic level of his own country. He noted the shortcomings of Mexico's law on treaty ratification, which originally was adopted in order to address a single issue. He also explained that international agreements struck at any level in his country can lead to international responsibility of the State and, consequently, in terms of formal requirements, every agreement must be backed by a prior legal opinion to be executed, based on the legal competence of the entity, with the obligation to be included in the government registry. He also expressed his agreement with the classification presented by the Rapporteur, but suggested that treaties be split into two types: *latu sensu* and *estricto sensu* (State to State agreements that require parliamentary approval). When a classification is required based on the entity executing it, then there must be a distinction drawn between agreements or treaties entered into between executive branches, agreements that are entered into between ministries, and lastly, agreements entered into between subnational units (the practice varies, in some places agreements may only be executed between similar categories of entity). As to the Rapporteur's questions, he asserted that a practical guide should be drafted to establish general principles. As a second component, a catalogue of best practices should be included (requirements for their formalization, coordination mechanisms, etc.). A list of agreements with different characteristics should be provided in light of legal requirements at the domestic level. Lastly, questionnaires should be very simple.

Dr. Carlos Mata Prates thanked Dr. Hollis for his report. As to differentiation between a treaty and a political declaration, he requested separating the field of international law from the field of domestic rights (which requires resorting to constitutional law). If we engage in an exercise that involved both spheres, the job will be very complex, despite the interest of the legal advisors in constitutional issues. As to the classification based on the effects, it would be worthwhile, he said, to frame it to determine whether or not they have legal effects. When a pronouncement is made in favor of a treaty, a link should be established with the domestic law that takes into consideration the application of domestic procedures. In the case of political declarations, there should be clear guidelines without dwelling on determining whether or not it creates legal effects. The task of distinguishing declarations from treaties is complex. Accordingly, he proposed to the Rapporteur to flesh out the topic of the effects of instruments instead of the determination of their nature, inasmuch as it can be established based on the actor that participates in it and serves as a point of reference to establish its nature, but in every case, the State is responsible.

Dr. Correa joined in congratulating the Rapporteur and explained that regulation in Colombia is made up of different controls or checks in terms of procedures for the signing of international instruments. She requested the Rapporteur to take into account the declarations adopted by legislative and judicial bodies in several forums, which do not necessarily fall under the scope of the mandatory. As to the questionnaire, she expressed her reticence about the success of said methodology to gather information in light of her experience on the topic of control of conventionality. She suggested crafting generic questions to facilitate the submission of responses. The Chair asked Dr. Correa to communicate directly with the members of the Committee of the States that have not responded to her questionnaire.

Dr. Elizabeth Villalta agreed with the statements of her colleagues and invited the Rapporteur to review domestic regulation of the States that allow officials to execute treaties. That

is why a questionnaire should be submitted to all States to find out about the experience of each region, which should include the following questions, in addition to other ones:

- The type or category of instrument that they sign;
- Whether they are parties to the Vienna Convention on the Law of Treaties or whether they enforce it as customary law;
- The way in which political declarations are put on the record.

The report should allow us to draw a conclusion on how States use treaties.

Dr. Juan Cevallos congratulated the Rapporteur on the way she presented the report considering that topics of this complexity require serious thought. He said that although the questionnaire may be helpful, it is possible to end up with a lot of domestic procedures, which dilute the subject and, for that reason, he proposed seeking the participation of the States in the drafting of the document.

Dr. José Moreno congratulated the Rapporteur for his work. He noted that political commitments should be fleshed out and, in this regard, he suggested devoting some space to the topic of centralized registries. He also concurred on the importance of simple questionnaires.

Dr. Alix Richard concurs with the Committee members about the report presented by the Rapporteur. He cited the existence of agreements between cities of Haiti and other cities of world and urged the Rapporteur to include this arrangement. He explained in broad strokes the domestic system of ratification in Haiti, which requires review of the constitutionality of treaties. Lastly, he mentioned the signing of memoranda of understanding as a recent practice.

Dr. Carlos Mata asked the Rapporteur to differentiate the international sphere from domestic spheres, in view of what said distinction means, in particular, to a judge of an international forum. A study of the domestic sphere would involve a complex domestic discussion about the provinces and scopes of the constitutional law of each State, a considerable challenge. Consequently, he suggested that the Rapporteur focus only on the international sphere. He mentioned international courts, in their judgments, regarding domestic acts as unilateral. He also supported the idea of short texts in the questionnaire.

Dr. João Clemente Baena Soares thanked the Rapporteur for the excellent contribution of his report, which presents a topic of immediate practical interest. He also suggested drafting simple, direct and pragmatic questionnaires and that the members help to encourage responses in their respective Ministries of Foreign Affairs. In his experience, establishing agreements between foreign entities or municipal units with Brazilian ones has not had a positive effect and have had to be neutralized through effective provisions. He also expressed agreement with Dr. Mata Prates's differentiation between constitutional and international law.

The Chairman first stressed the importance of the topic, about which there is great uncertainty because of the lack of clarity between rules. He did not see any contradiction between the need to address international law and domestic law. He said we are aiming to differentiate between a non-binding agreement and an international treaty; this can be done by reviewing the practice of the States. We should find out how States address this issue, including learning about the different types of legal provisions that the States apply and their practice. The topic involves, he said, two areas: agreements between States and agreements between non-State entities. In the first group, he suggested looking at the intent of the parties to see if they are binding or not (he cited the case of maritime delimitation and territorial issues between Qatar and Bahrain). In the second area, he suggested reviewing the status of agreements signed by non-State entities, in terms of domestic law and the practice of States with regard to these instruments. It is something that must be done cautiously. In addition to that, we should try to review the issue of breaches and whether it incurs State responsibility, based on the traditional rules. As to legitimate expectation or *estoppel*, he proposed that they be treated cautiously. He agreed the questionnaire should be brief and concrete, to address crucial issues and encourage the highest number of responses possible. It is also

essential, he noted, to hold a meeting of the legal advisors of the region to discuss, among other topics, work on this subject matter.

Dr. Duncan Hollis expressed appreciation for the members' remarks. In response to the topic of the extensiveness of the questionnaire, he agreed with the opinions put forward and explained that his original idea was to be able to present a wide range of options. As to the approach, he thought that the idea is mostly to stick to the sphere of international law, but at the same time certain domestic topics are relevant, particularly with regard to instruments drafted by agencies or subnational or regional governments. Although the way each country regulates its domestic cases is not going to be explained, because of the implications of State responsibility, domestic law has to be taken into account.

He proposed as the next step to review the questionnaire next week with the support of the Secretariat, and once it is approved by the members, to circulate it among the States. He will also review the situation of the simplified agreements and he noted that it would be unwise to flesh out the topics concerning *estoppel.* The intention therefore is to distinguish treaties from declarations, and determine the status with respect to adoption of agreements by subnational entities, in a non-judgmental way, respecting the sovereignty of each State. Lastly, he agreed with Dr. Correa's idea on the subject of questionnaires.

Dr. Joel Hernández thanked the Rapporteur for his focus on international rather than domestic or constitutional law. He also stressed the importance that the Rapporteur has attached to the intent of the parties to determine whether or not the instrument involves an obligation or a political declaration. Lastly, he requested the Rapporteur to include a section on minimum standard rules in political declarations.

The President supported Dr. Hernández's proposal and urged the Rapporteur to include references to overt violations of norms pertaining to the capacity or competence to enter into treaties. That would make it necessary to link international law and domestic law in order to determine the international standards existing in the subject matter with respect to the determination of the nature of the instrument. Lastly, he proposed that the questionnaire be sent out as soon as possible.

The document submitted by doctor Hollis in August 2017 is included below.

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CJI/doc.542/17 corr.1

PRELIMINARY REPORT ON BINDING AND NON-BINDING AGREEMENTS

(Presented by Dr. Duncan B. Hollis)

Introduction

1. At the 89th Regular Session of the Inter-American Juridical Committee, the Committee held an inaugural meeting with legal advisors to the Foreign Ministries of Member States. The meeting was attended by representatives from Brazil, Chile, Mexico, Paraguay, Peru, United States, and Uruguay.[1] During the discussions, Brazil's representative suggested that the Committee study "the practice of States regarding memorandum of understanding that are adopted by various national agencies and sent to Congress for approval" with an eye to developing general principles or best practices.[2] Representatives from Chile, Paraguay, and Peru all expressed support for the idea. Chile and Peru's representatives noted open questions about the existence and status of agreements concluded by actors other than the State itself,

[1] See *Annual Report of the Inter-American Juridical Committee to the Forty-Seventh Regular Session of the General Assembly*, OEA/Ser.G CP/doc.5261/17 (31 Jan. 2017) at p. 10.

[2] *Summarized Minute*, Meeting with the Legal Advisors of the Ministries of Foreign Affairs, 5 Oct. 2016, in *Annual Report*, *supra* note 1, p. 153, 160.

whether institutions (or agencies) of the State's government or sub-national actors such as provisional/municipal governments. Paraguay's representative emphasized the problem of determining whether and when these agreements would constitute treaties.

2. The Committee subsequently discussed the issue in examining its future agenda.[3] The President noted that the issue of the "juridical nature of inter-institutional agreements" was among the "most pressing" topics identified by the Legal Advisers, and one where the Committee's guidance could be of real use to Member States. The Committee noted the practice of agreements among government agencies and sub-national units as well as the legal and logistical challenges they posed. Legally, there were questions about the status and effects of such agreements under international law (specifically the 1969 Vienna Convention on the Law of Treaties). Logistically, there were questions about how to balance the need for States to oversee international agreements with the need to not overwhelm a Foreign Ministry or to unnecessarily slow the pace of cooperation on important subjects (such as agreements among state power companies). It was noted that Uruguay has drafted a decree on procedures for reviewing this practice while a similar effort has been discussed in Paraguay. As a result of these discussions, the Committee formally agreed to add to its agenda the topic "Legal standing and effects of inter-institutional agreements of international character."

3. At its 90th Regular Session, the Committee returned to the subject. It was noted that the issue implicated additional questions regarding differing State practice in concluding "simplified" or "executive agreements" as well as "non-binding" Memoranda of Understanding (MOUs). The Committee recrafted the subject as one of "Binding and Non-Binding Agreements," appointing the author to serve as Rapporteur.[4]

4. At first glance, the topic of binding and non-binding agreements is a broad one, encompassing multiple issues (and problems) for Member States. In this report, I identify four discrete sets of issues: (i) differentiation, (ii) capacity, (iii) effects; and (iv) procedures:

i. *Differentiation:* what are the categories of binding or non-binding commitments that occur in the international context? How can we reliably identify and differentiate among them in practice?
ii. *Capacity:* to what extent do actors other than States themselves (for example, agencies within a national government or sub-national governments) have the capacity to engage in one or more of these types of agreements?
iii. *Effects*: what are the legal effects, if any, of concluding any particular type of international agreement?
iv. *Procedures*: what procedures, if any, does a State employ to coordinate, authorize, or manage each of the different types of international agreement?

I examine each of these topics below. However, as I explain, the resulting analysis is necessarily preliminary due to incomplete information on State priorities, practices and preferences. As a result, I conclude this initial report with a recommendation on next steps. Specifically, I propose that the Committee approve and send to Member States a questionnaire on the subject of binding and non-binding agreements (I attach a rough draft of such a questionnaire in the Appendix). In addition, I seek the Committee's guidance on the appropriateness of drafting general principles or best practices on one or more of the outstanding issues with binding and non-binding agreements.

I. Differentiating Among International Agreements

5. States interested in making international commitments have at least three vehicles for doing so: *treaties*, *political commitments*, and *contracts*.[5] Two of these categories—treaties

[3] *Reflection on the work of the Inter-American Juridical Committee: Compilation of topics of Public and Private International Law*, in *Annual* Report, supra note 1, at 124.
[4] *Annotated Agenda of the Inter-American Juridical Committee*, 91st Regular Session, August 7 to 16, 2017, p. 60.
[5] States may also commit themselves through unilateral declarations. *See Nuclear Tests (Australia/New Zealand v France*) [1974] ICJ Rep 267-68 [43]-[50]; International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* (2006) 58th Sess., UN Doc A/61/10.

and contracts—involve "binding" agreements, while the other—political commitments (including MOUs)—bears the label "non-binding" because these instruments seek to avoid the mantle of law entirely. Treaties and contracts are well defined in international and domestic law, while political commitments are most often defined in contradistinction to these other two instruments. Taken together, these definitions suggest a series of subjective or objective criteria for identifying an international agreement and categorizing it appropriately. There remain, however, several unresolved questions about how to apply these criteria as well as the appropriate default rules where evidence of an agreement's status is lacking.

A. Treaties

6. Treaties are international legal agreements of ancient origin. In international law, a treaty is usually defined by reference to the 1969 Vienna Convention on the Law of Treaties (VCLT):

> For the purposes of the present Convention: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[6]

This definition is widely accepted. The International Court of Justice (ICJ) has suggested it reflects customary international law, most states endorse it, and scholars frequently cite it.[7]

7. The VCLT definition suggests a treaty has four basic ingredients, namely (a) an international agreement; (b) concluded among States; (c) in writing; (d) governed by international law, while also dismissing the relevance of two other potential ingredients—the number of instruments in an agreement and its title.

8. For starters, the requirement of an "international agreement" is critical, but often overlooked. As "agreements," treaties necessarily involve a mutuality of commitment – an interchange among two or more participants. Moreover, the exchange must be normative—expressing a shared expectation of future behavior. An instrument that merely describes each participant's positions or even their "agreed views" is not likely to qualify as a treaty. That said, treaties may be one-sided; unlike those States whose domestic contract law requires consideration—treaties do not require an exchange of commitments. The meaning of the "international" qualifier is harder to discern. It specifies treaties as a sub-set of all agreements. In other words, all treaties are agreements but not all agreements are treaties. But the "international" adjective has not been read to limit treaties to particular subjects. Rather, it is usually understood to tie treaties to certain actors and international law itself, even though the VCLT definition otherwise deals with both of those issues expressly.[8]

Given our focus on "agreements", however, I have left unilateral declarations outside this Report's ambit.

[6] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 2(a).

[7] *See, e.g., Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* [2002] ICJ Rep 249 [263]; *Texaco v. Libyan Arab Republic* (1977) 53 ILR 389, 474; Duncan B. Hollis, "A Comparative Approach to Treaty Law and Practice" in *National Treaty Law and Practice* (DB Hollis et al, eds., Nijhoff, 2005) (hereinafter "NTLP") 9 (in survey of 19 states including Canada, Chile, Colombia, Mexico and the United States, "virtually every state surveyed" accepts the VCLT definition); Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer, 1996) 40; Anthony Aust, *Modern Treaty Law & Practice* (2nd edn CUP, Cambridge 2007) 14; Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven Int'l Publishing, 2005) p. 6-25.

[8] *See* H Waldock, *First Report on the Law of Treaties* [1962] YBILC, vol II, 32 art 1(a) (defining an 'international agreement' as 'an agreement *intended* to be governed by international law and concluded between two or more States or other subjects of international law') (emphasis added).

9. Second, beyond an "international agreement" the VCLT defines a treaty by the nature of those who conclude it, namely States.[9] It is clear, however, that the VCLT offers States as an illustrative example, rather than the only category of treaty-makers. As VCLT Article 3 makes clear, "other subjects of international law" may have the capacity to form treaties.[10] Who are these "other subjects"? International organizations (IOs) are the most obvious candidates, with practice widely recognizing their treaty-making capacity.[11] Beyond IOs, however, other non-State actors have concluded treaties, including overseas territories, insurgent groups, and—arguably—even private persons (in the context of investor-state arbitration). Below, I consider further the specific treaty-making capacities of government agencies, ministries, and sub-national units like a province or municipality.

10. Third, the VCLT suggests a treaty must be in writing. In other words, there must be some permanent and readable evidence of agreement. The form of the writing does not appear to matter. State practice has not required either signature or publication. VCLT Article 3 also acknowledges that a treaty might exist even without a writing.[12] Thus, there remains a theoretical possibility of States concluding oral treaties, although the actual practice is sparse.[13] Moreover, the domestic laws of some Member States may preclude the State from making such treaties even if international law allows them.[14]

11. Undoubtedly, the most important (and most controversial) ingredient of a treaty is the fourth one—the requirement that it be "governed by international law." If questions arise about whether a particular text constitutes a treaty, this is almost always the criterion under debate. The reason lies in ambiguity about whether this criterion can be satisfied by objective or subjective evidence. The U.N. International Law Commission (ILC) favored using a subjective test – the intentions of the agreement's negotiators—to ascertain its treaty status.[15] Today, many States and scholars appear to view this condition along similar lines, assuming a requirement that the participants intend to create a treaty is subsumed in the "governed by international law" criterion. Under this view, if qualified parties intend their agreement to be a treaty, it is a treaty; if they lack this intent (or affirmatively have an intent *not* to create one), the agreement will be denied treaty status.

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[9] A treaty is usually considered "concluded" when the parties adopt the text or it is opened for signature.

[10] VCLT Art. 3 ("The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law . . . shall not affect: (a) The legal force of such agreements . . .").

[11] *See, e.g.,* Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543.

[12] VCLT art 3 ('The fact that the present Convention does not apply … to agreements not in written form, shall not affect: … (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention).

[13] A U.S. statute, for example, contemplates the existence of oral international agreements, requiring that any such instruments must be promptly reduced to writing. *See* Case-Zablocki Act, 1 USC §112b.

[14] *See, e.g.,* Germán Cavalier, *National Treaty Law & Practice: Colombia*, in NTLP, *supra* note 7, at 196 ("In international matters, the Colombian state and its agencies are not bound by verbal agreements because the citizens and civil servants are not obliged to observe rules that have not been duly promulgated in print by the *Official Journal*.").

[15] UN Conference on the Law of Treaties, *Summary Records of Second Session*, A/CONF.39/11, Add.1, 225 [13] (Drafting Committee "considered the expression 'agreement ... governed by international law' ... covered the element of intention to create obligations and rights in international law"); [1966] YBILC, vol, II, 189 [6] (ILC "concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase 'governed by international law', and it decided not to make any mention of the element of intention in the definition").

12. Despite such widespread emphasis, however, the intent test is not without controversy. As Roberto Ago once suggested, there are strong arguments that agreements on certain topics (e.g., territorial boundaries) should be treaties whatever the parties intend to the contrary.[16] Moreover, the International Court of Justice has in several cases overlooked evidence of party intent in ascribing treaty status to an instrument. In *Qatar v Bahrain*, the ICJ found the parties had concluded a legally binding agreement accepting ICJ jurisdiction, notwithstanding protestations by Bahrain's Foreign Minister that he had not intended to do so.[17] The Court based the agreement's existence on the "terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention."[18] At a minimum, therefore, the framework and contents of an instrument may be invoked as better evidence of the participants' "manifest" intentions than their subsequent statements of intent. Or one could go further and read the Court to suggest that an instrument might qualify as a treaty if its architecture and language objectively signal that status without regard to intent at all.

13. The VCLT definition also helpfully clarifies certain criteria that should not be determinative of treaty status. It makes clear, for example, a treaty's existence will not turn on the number of instruments employed. A treaty can be in a single text or a series of instruments. The North American Free Trade Agreement (NAFTA), for example, consists of an original agreement along with a series of subsequent notes, signed on December 8, 11, 14 and 17, 1992.[19]. Meanwhile, although a text's designation (that is, its title) may aid in categorization, it will not be determinative. Treaties bear all sorts of titles, including act, agreed minute, charter, convention, covenant, declaration, memorandum of agreement, memorandum of understanding, note verbale, protocol, statute, and, of course, treaty. At the same time, some of these titles (especially Memorandum of Understanding) are used in political commitments. As such, it is important not to assume treaty status (or its absence) because of the title used.

B. Political commitments

14. During their preparatory work on the law of treaties, the ILC took care to exclude from the treaty concept agreements not governed by law. [20] Today, such agreements are called "political commitments." Political commitments are agreements among States (or international actors more generally) that are intended to establish non-legal commitments of an exclusively political or moral nature. Thus, they set normative expectations for future behavior among

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[16] *See* [1962] YBILC, v. I, 52 [19] (resisting the idea "that states could always pick and choose from among various legal systems" since international law might regard agreements on certain subjects (e.g., boundaries, territorial seas) as treaties regardless of what States parties intended).

[17] *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112 [27]. The reasoning behind the Court's decision, however, remains in dispute. Scholars debate whether (a) the ICJ was giving effect to the parties manifest intentions in the text over subsequent statements to the contrary, (b) adopting an objective approach to identifying a treaty, or (c) articulating a *sui generis* rule for agreements accepting the Court's jurisdiction. See Duncan B. Hollis, "Defining Treaties," in *The Oxford Guide to Treaties* (DB Hollis, ed., OUP, 2012) 28 (reviewing competing views of Aust, Klabbers, Chinkin, Fitzmaurice and Elias).

[18] *Qatar v. Bahrain*, 1994 ICJ Rep. at [27]. In the *Aegean Sea Continental Shelf Case*, the ICJ found no intent to submit a dispute to the Court under the agreement presented, although it was not clear if the Court reasoned that the text was not legally binding or its scope failed to trigger ICJ jurisdiction on the facts presented. *Compare* Aust, *supra* note 7, at 51-2; *with* Christine Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States" 10 Leiden J. Int'l L. 223, 234 (1997).

[19] NAFTA (Canada-Mexico-US) (signed 8, 11, 14 and 17 December 1992, entered into force 1 January 1994) [1993] 32 ILM 296 and [1993] 32 ILM 605.

[20] Eg [1959] YBILC, vol II, 96-97 [8] ('instruments which, although they might look like treaties, merely contained declarations of principle or statements of policy, or expressions of opinion, or *voeux*, would not be treaties'); Efforts to make this distinction explicit at the Vienna Conference were, however, unavailing. U.N. Conference, Second Session, *supra* note 15, at [13], [21]-[22].

participants, but they invoke morality or political relationships as the basis for any obligation in lieu of law. As such, political commitments exist in contradistinction to the "binding" nature of treaties and contracts, covering agreements that fall outside the corpus of law, whether international or domestic.

15. Compared to treaties, political commitments are a relatively new category of agreements, first recognized in the "gentleman's agreements" of the late nineteenth and early twentieth centuries.[21] The visibility of such commitments has grown over time from the Shanghai Communique and the Helsinki Accords to more recent texts like the "Iran Deal" on nuclear non-proliferation.[22] Today, there is increasing evidence that in many circumstances States prefer to pursue political commitments in lieu of treaties.[23] Trading off the credibility that accompanies a treaty, States often pursue political commitments because of their flexibility – they can usually be formed, amended and exited more quickly than treaties. Although substantively, they can address matters just as important (or insubstantial) as a treaty text, political commitments generally do not trigger domestic approval procedures or publication requirements, allowing them to be confidential if so desired.

16. Like treaties, political commitments bear many names, including "memorandum of understanding" – a title regularly used by Commonwealth countries to signal a political commitment. However, I employ the term "political commitment" here because there are examples of such instruments that do not bear the MOU header. Moreover, as noted in discussing the treaty definition, there are instances of treaties bearing the MOU title as well.

17. Several OAS Member States evidently have a practice of concluding political commitments, including both Canada and the United States.[24] However, the absence of domestic procedures for cataloging these agreements make it difficult to ascertain the full depth and scope of the practice. It is also unclear whether and how often other OAS Member States employ political commitments. We might assume that, in addition to Canada, the eleven OAS Member States that participate in the Commonwealth of Nations do so. But this is only an assumption. Moreover, although the October 2016 meeting with the Legal Advisers suggests that some of the other OAS Member States have a familiarity with political commitments (especially MOUs), we lack both empirical data and formal statements from Member States on how they view this phenomenon.

18. What identifies an agreement as a political commitment? Like treaties, political commitments require some form of mutuality and a shared expectation as to future behavior. But, unlike its controversial role in the treaty context, manifest intent takes center stage in defining the political commitment. States appear to assume that they can create a political commitment either by affirmatively expressing an intention to do so, or, alternatively, by making clear that their agreement is not intended to give rise to rights or obligations under international law.

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[21] The historical practice of "personal" treaties, sponsions and informal agreements suggests, however, that political commitments have earlier origins. See Hugo Grotius, *The Rights of War and Peace* 167 (K. Haakonssen & R, Tuck, eds., Liberty 2005) (1626); Emerich de Vattel, *The Law of Nations* §§ 209-11.

[22] Joint Comprehensive Plan of Action among China, France, Germany, Iran, Russian Federation, United Kingdom and United States (July 14, 2015), *available at* http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/; The Final Act of the Conference on Security and Cooperation in Europe, 73 Dep't. St. Bull. 323 (1975); U.S.-China Joint Communique, 66 Dep't. St. Bull. 435 (1972).

[23] See Joost Pauweln, Ramses Wessel, and Jan Wouters, eds., *Informal International Law-Making* (OUP, 2012).

[24] *See* Duncan B. Hollis & Joshua Newcomer, "'Political' Commitments and the Constitution, 49 Va J. Int'l L. 507 (2009) (providing examples from U.S. practice); Maurice Copithorne, "National Treaty Law & Practice: Canada," in NTLP, *supra* note 7, at 91, 92-93 (noting with respect to Canadian MOUs, that Canada has "traditionally considered that such documents do not create a legal relationship").

C. Contracts

19. The existence of a binding international agreement may prevent it from qualifying as a political commitment, but it will not always constitute a treaty. In its treaty work, the ILC emphasized that States (and presumably IOs and other subjects of international law) can choose legal systems besides international law to govern the formation, application, and interpretation of an agreement.[25] Thus, contracts concluded under the domestic law of one or more States serve as an alternative to treaty-making. In such cases, the agreement is governed exclusively by domestic law (I say "exclusively" to account for the fact that many treaties enjoy a legal status under both domestic and international law).

20. At least some OAS Member States have developed a practice of concluding contracts among government agencies. The United States, for example, has a whole domestic legal regime for foreign military sales contracts while Colombian law "recognizes and regulates the adoption, approval, and effect of contracts entered into by the government of Colombia with foreign government agencies" including the possibility that foreign law may govern in certain contexts.[26]

D. How to Differentiate among Treaties, Contracts and Political Commitments?

21. How can States discern whether an international agreement is a treaty, a political commitment or a contract? I suggest a two-step process. First, we must determine if the text is binding or non-binding. Where the agreement is non-binding, it is a political agreement. But where it is binding, a second step requires determining if the instrument is a treaty or a contract.

22. To identify an agreement as binding (or not), we could endorse and employ the intent test, looking for manifestations of States' shared intentions in the text or the circumstances of an agreement's conclusion. In some cases, States may short-circuit this inquiry by including express language on whether they regard an agreement as binding or non-binding. Treaties do not usually contain such expressions of intent, but contracts and political commitments sometimes do. For example, a 1998 Agreement between the U.S. National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) indicates in section 9.0:

> The Parties hereby designate the United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement, the meaning of its provisions, and the rights, obligations and remedies of the Parties. . .[27]

A 2008 MOU between the U.S. Department of the Interior and Environment Canada on Shared Polar Bear Populations stated "This Memorandum of Understanding is not legally binding and creates no legally binding obligations on the Participants."[28] Or, consider the 1986 CSCE Document on Confidence and Security Building Measures in Europe, which indicated "the measures adopted in this document are politically binding and will come into force on 1 January 1987".[29]

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[25] *See* [1966] YBILC, vol II, 189 [6].

[26] *See* U.S. Foreign Military Sales program, available at http://www.dsca.mil/programs/foreign-military-sales-fms; Cavalier, *supra* note 14, at 196 (citing Law 80 of 1993, Art. 13). Canada also recognizes that States can choose between a treaty and a contract to regulate inter-state sales deals or land leases. Copithorne, *supra* note 24, at 93.

[27] Agreement between the U.S. National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) on Training of NA AEB Mission Specialist (Nov. 19, 1998), available at http://www.aeb.gov.br/wp-content/uploads/2012/09/AcordoEUA1998-2.pdf. What happens, however, if the selected domestic law does not recognize the agreement as a contract is an open question.

[28] Memorandum of Understanding between Environment Canada and the US Department of the Interior for the Conservation and Management of Shared Polar Bear Populations (2008) at http://graphics8.nytimes.com/packages/pdf/national/20080515polar_memo.pdf.

[29] CSCE Document of the Stockholm Conference on Confidence- and Security-Building

23. In other cases, indications of intent may reside in the specific words used. In English, for example, the use of the verb "shall" almost always signifies an intent to create legal rights or obligations. In contrast, the verb "should" just as often signifies a preference that does not include any binding commitment. In practice, there are many words and phrases used in treaties (e.g., article, agree, authentic, done at, enter into force, obligations, parties) that sophisticated negotiators will avoid using where they intend a non-binding political commitment. Over time, certain terms and phrases have also become common in political commitments to signal non-binding intent. For example, instead of treaty "parties", political commitments often refer to "participants"; instead of "entering into force" a political commitment will "come into effect"; and instead of articles, political commitments may have paragraphs.[30]

24. Beyond terminology, other aspects of an agreement can offer evidence of the authors' intentions.

- Both treaties and political commitments may contain provisions on dispute settlement, but compulsory third party dispute settlement usually signals a treaty.
- Treaties often contain elaborate provisions for consenting to be bound (usually a specific clause offering options such as definitive signature, simple signature followed by ratification, accession, acceptance, or approval) that will not be used in a political commitment. Indeed, although many political commitments are signed, some forgo signature, with the text simply released to the press or otherwise published.
- If the agreement has a designated depository or there are provisions for its registration with the United Nations (as required by Article 102 of the Charter), that suggests an intention to create a treaty.[31]
- Treaties regularly incorporate notice requirements for termination or withdrawal (for example, requiring 6 or 12 months advance written notice). Since it is non-binding, however, a political commitment may have a provision allowing for a participant's immediate withdrawal. Some care is required here, however, since the VCLT acknowledges that treaties can lack a withdrawal or termination clause, providing default rules in such cases.[32]

These practices must be understood as guidelines more than fixed rules. There are examples where States intend to create a political commitment but still use treaty language (see, for example, the reference to "entry into force" in the 1986 CSCE Document quoted above). Current practice thus suggests a holistic inquiry – identifying the authors' manifest intent by looking at the whole agreement and the circumstances of its conclusion.

25. Some agreements contain a mix of clearly binding and clearly non-binding provisions. In such cases, the agreement should be treated as binding, since a political commitment cannot, by definition, be binding in any part. State practice appears to bear this out. Consider for example, the Paris Agreement on Climate Change—a treaty—which (famously) uses the verb "should" to define the parties' central obligation to set economy-wide emission reduction targets, while using the verb "shall" in other provisions on future meetings and reporting.[33] In other words, treaties can contain provisions that the parties do not intend to be binding alongside those they do. Of course, this possibility complicates any

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Measures and Disarmament in Europe (1986) [1987] 26 ILM 190, [101].

[30] For a more elaborate explanation of the practice from a U.K. perspective, see Aust, *supra* note 7.

[31] Note, however, that the failure to register an agreement with the United Nations is not determinative of its status. And although the Charter suggests unregistered treaties may not be invoked before the U.N. or its organs, the ICJ has not done much (if anything) to implement that condition. *See Qatar v. Bahrain*, 1994 ICJ Rep. at [17]-[29].

[32] *See* VCLT, Art. 56.

[33] *Compare* U.N. Framework Convention on Climate Change, Adoption of Paris Agreement, FCCC/CP/2015/L.9, Dec. 12, 2015 art. 4.4 *with* arts. 4.9 & 4.12. The Paris Agreement's intended treaty status is also evident in the presence of clauses on consent, entry into force, and withdrawal or termination.

application of the intent test, since it requires evaluating intent on a provision-by-provision basis.

26. Unfortunately, State practice suggests that in some cases negotiators will fail (or purposefully avoid) addressing what kind of agreement they intend to make. This can lead to disputes. For example, for many years, the United Kingdom and other Commonwealth States like Canada employed the verb "will" to signal an intention to create a non-binding agreement, while the United States insisted that "will" could be indicative of a binding agreement in the right context. This led the United States to regard as treaties a number of defense-related MOUs that its partners (Australia, Canada, and the United Kingdom) regarded as non-binding. The situation caused some significant tensions among the States involved, particularly for the United States as its domestic law required these agreements to be treaties. Eventually, the parties concluded new "Chapeau" treaties that clarified the binding status of the commitments made.[34]

27. Such disputes—combined with the possibility that even a holistic analysis may prove inconclusive—suggests the need for a default presumption. When States enter into an agreement without explicitly manifesting any intention that it is binding or not, States could adopt a presumption in favor of its bindingness. Or, States could presume such agreements are political commitments. In either case, a presumption could be overcome by countervailing evidence. Thus, the Committee may wish to consider supporting a default rule on which States and other actors could rely to help resolve some of the confusion in current practice.

28. Assuming a binding agreement, how do we discern if the parties intended to create a treaty or a contract? Like the first step, this second one may require attention to the parties' intentions. As noted above, States seeking a contract can specify that status by designating the governing (domestic) law of the agreement. Problems arise, however, where the text is silent.[35] When two states conclude what looks like a binding agreement, is the presumption that it constitutes a treaty or a contract? The majority view appears to be that, absent a manifest intention to the contrary, the agreement will be a treaty by default.[36] But there have been suggestions of "hybrid" agreements that are generally governed by international law, but with certain specific aspects subject to national law.[37]

29. Of course, it is not certain that a manifest intent test will be universally applied to differentiate binding from non-binding agreements, let alone treaties from contracts. As *Qatar v. Bahrain* suggests, there is support for a more objective test for determining a treaty's status, whether based on its specific contents or the context of its conclusion.[38] And domestic law may recognize the existence of a contract "in fact" or "in law" independent of party intentions. To date, we have yet to see an international court or tribunal overrule the parties' intentions expressed in the agreement itself. Still, the possibility of competing tests for differentiating

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[34] J McNeill, "International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding," 88 Am. J. Int'l L. 821 (1994);

[35] Other problems might arise if the domestic legal system does not recognize the contract's validity. Moreover, there can be private international law issues if it is not clear whether States opting for a particular domestic law are selecting only its substantive provisions, or if they also meant to select its conflicts of law provisions.

[36] Professor Jan Klabbers devoted an entire book to establishing this presumption. *See* Klabbers, *supra* note 7. For others favoring it, see Anthony Aust, "The Theory & Practice of Informal International Instruments," 35 Int'l & Comp. L. Q 787, 798 (1986); K Widdows, "What is an Agreement in International Law," 50 Brit. Ybk Int'l L. 117, 142 (1979); Hersh Lauterpacht, *Second Report on the Law of Treaties*, [1954] YBILC, v. II, 125. Other scholars suggest that the presumption should run the other way (against treaty-making absent a clearly manifested intent to do so). *See* Oscar Schachter, "The Twilight Existence of Nonbinding International Agreements," 71 Am. J. Int'l L. 296, 297 (1977); JES Fawcett, "The Legal Character of International Agreements" 30 Brit. Ybk Int'l L. 381, 400 (1953).

[37] *See* Paul Reuter, *Third report on the question of treaties concluded between States and international organizations or between two or more international organizations*, [1974] YBILC, v. II(1), 139.

[38] *See supra* note 17-18, and accompanying text.

among agreement types suggests there might be room for the Committee to offer its views on the preferred approach as a general principle or best practice.

II. Capacity: Who Can Make International Agreements?

A. The Capacity to Make Treaties: Government Agencies and Sub-National Units

30. Writing in 1923, the PCIJ's *Wimbledon* judgment characterized treaty-making as "an attribute of State sovereignty."[39] As such, States clearly have the capacity to make treaties. International law is less clear, however, as to who may represent—or serve as agents of—a State in treaty-making. State practice suggests that national ministries (also known as government agencies) may do so. Outside of the OAS Region, States like Austria, China, Germany, India, and Russia have a practice of concluding treaties at three levels: State-to-State, government-to-government, and agency-to-agency.[40] Other States like Canada, Switzerland, the United Kingdom and the United States authorize their government agencies to conclude international agreements they recognize as treaties.[41] At the same time, it appears that States like Egypt and South Africa deny their government agencies the capacity to conclude treaties, while other States like Japan and Israel allow them only where they are duly authorized by existing treaties or domestic law.[42]

31. Thus, existing State practice appear to recognize a treaty-making capacity in government agencies only to the extent the State of which that agency is a part does so. Moreover, any such treaty-making would presumably also require the consent of any prospective treaty partner. For example, States that deny treaty-making to their own agencies may refused to conclude a treaty with a foreign government agency, even if that agency's government has authorized it to do so (a government-to-government treaty is usually concluded instead). Taken together, State practice suggests that international law permits agency-level treaties where there is both "internal" authorization from the State of which the agency is a part as well as the "external" consent of any treaty partners.

32. This rule, however, comes with several caveats. For starters, the State practice surveyed is limited. Particularly among OAS Member States, it is not clear which States authorize agency-level treaty-making and which preclude the practice? It would be good to clarify the position and practice of Member States before the Committee crafts any general principles or best practices.

33. Second, is not clear if international law will defer to the authorizing State entirely. For example, international law traditionally attributes legal responsibility to the State even when the agreement is concluded by one if its agencies. Several states, however, have authorized their agencies to make international agreements on the understanding that any such agreements would only bind the agency and not the State as a whole.[43] Mexico, for example, passed a Treaty Law in 1991 that authorizes "inter-institutional agreements", defined as

> [A]n agreement governed by public international law, entered into in writing between any centralized or decentralized agency of the Federal, State or Municipal Public Administration and one or more foreign government agencies or international organizations, whatever its denomination, and without regard to whether or not it arises out of a previously approved treaty.

These inter-institutional agreements are only authorized within the agency's scope of activities, and, more importantly, are regarded by Mexico as "only binding upon those agencies, which have entered into them, and not upon the federation…"[44] It is not clear,

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[39] *The S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 25 (June 28).
[40] Hollis, *supra* note 7, at 17.
[41] *Id*.
[42] *Id*.
[43] France allows its government agencies to conclude agreements—dubbed *arrangements administratifs*—with their counterparts. These agreements are authorized within an agency's scope of activities and "do not bind the State, only the signatory agency." Pierre Michel Eiesmann and Raphaël Rivier, "National Treaty Law & Practice: France," in NTLP, *supra* note 7, at 254-5.
[44] Luis Miguel Díaz, "National Treaty Law & Practice: Mexico," in NTLP, *supra* note 7, at 450.

however, if international law permits Mexico to limit the agreement's binding quality—not to mention legal responsibility—to the agency alone. International law might thus independently limit *how* a State can authorize agency-level treaty making.

34. Third, there is the additional problem where agency-to-agency agreements lack any domestic authorization. It is not clear how international law regards such "extra-constitutional" agreements. Considered alongside efforts to associate bindingness with the agency alone, unauthorized agency-level agreements might suggest that these entities are operating not so much as agents of the State but as "other subjects" of international law in their own right? At present, there is little available information on how widespread the practice of unauthorized agency-level agreements has become, making it hard to judge its implications.

35. A similar set of questions surrounds the treaty-making capacity of sub-national units, including federal states, provinces, municipalities and semi-autonomous territorial entities, which are all legally dependent upon, or associated with, a sovereign State.[45] As with agency-level agreements, international law has long favored two prerequisites for sub-national treaty-making: (1) the consent of the State responsible for the sub-national unit; and (2) the willingness of treaty partners to accept the sub-national unit's treaty-making capacity.[46] The first element is usually the more important one as the willingness of the treaty partner's to conclude a treaty is evident from the existence of the treaty or a provision assenting to future sub-national treaty-making.[47] Moreover, there are a number of States that appear to restrict sub-national treaty making. Article 126 of Argentina's constitution for example indicates "The Provinces do not exercise the power delegated to the Nation. They may not enter into partial treaties of a political nature …"[48]

36. Where it occurs, State authorization for sub-national treaty-making may be ad hoc or general. In 1981, Canada authorized Quebec to conclude a separate treaty with the United States on pension payments as part of its own treaty with the United States.[49] For its part, the United States has given similar delegations as when it authorized Puerto Rico to join the Caribbean Development Bank in 1986.[50] In other cases, the authorization is more categorical. The 1991 Mexican Treaty Law discussed above authorizes Mexican state and municipal inter-institutional agreements alongside those at the Federal agency level. The U.S. Constitution, meanwhile, authorizes U.S. states to enter into "Agreements or Compacts" with foreign powers so long as the U.S. Congress consents.[51] Historically, this authority has been exercised rarely by U.S. states and even more infrequently in recent years.[52]

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[45] Here I am focused on the capacity of the sub-national unit to conclude treaties in its own name. In some domestic systems, the sub-national unit may play an important role in national treaty-making as well. *See, e.g.,* J.G. Brouwer, "National Treaty Law & Practice: The Netherlands," in NTLP, *supra* note 7, at 497 (describing Netherlands Antilles and Aruba's role in Dutch treaties); Copithorne, *supra* note 7, at 97-98 (describing provincial role in Canadian treaties).

[46] Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties,* III *Recueil des Cours* 66-71, 84 (1968); [1966] YBILC, v. II, 172, 191, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (ILC's draft art. 5.2 acknowledged members of a federal union may have a treaty-making capacity).

[47] For examples of treaties with clauses inviting sub-national participation, see Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XII, 1867 U.N.T.S. 3, 162; United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 305(1)(c)-(e), 306, 1833 U.N.T.S. 396, 517-18.

[48] Constitution of Argentina, *available in English at* https://www.constituteproject.org/constitution/Argentina_1994.

[49] *See* Agreement With Respect to Social Security, Mar. 11, 1981, U.S.-Can., art. XX, 35 U.S.T. 3403, 3417; Understanding and Administrative Arrangement with the Government of Quebec, Mar. 30, 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

[50] "Self-Governing and Non-Self-Governing Territories," 1981-1988 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, vol. 1, § 5, at 436, 438-40. Puerto Rico subsequently withdrew from the Bank.

[51] U.S. CONST. art. 1, § 10, cl. 3 ("No State shall, without the Consent of Congress ... enter into any Agreement or Compact ... with a foreign Power."). The U.S. Constitution also bars U.S.

37. What U.S. states are doing, however, is concluding unauthorized agreements with foreign powers.[53] My own 2009 study found 340 U.S. state agreements with foreign powers only a handful of which had received consent from the U.S. Congress. Some of these agreements might have been political commitments. But a number of them contain texts suggesting a binding intent. For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba to oppose certain inter-basin water transfer projects contemplated by U.S. federal law.[54] Other sovereign states are experiencing similar problems. Before the end of the twentieth century, for example, Quebec had reportedly concluded some 230 "ententes" with foreign governments, nearly 60% of which were with foreign states.[55]

38. As with agency-level agreements, therefore, any description of sub-national treaty-making capacity suffers from both logistical and legal challenges. Logistically, there are open questions about whether and how sub-national units are concluding international agreements, whether they are authorized to do so as "treaties" or what status they themselves envision for such agreements. Legally, there are questions about the status of agreements made by sub-national units, most notably whether they are binding or not.[56] There is also the question of whether international law regards these sub-national units as simply agents of the State (with the State assuming responsibility for the commitments undertaken) or more "independent" treaty-making authorities as "other subjects of international law" (in which case liability rests with the sub-national unit itself).[57] Traditionally, international lawyers have favored the view of State responsibility.[58] But a different answer may be possible as more information becomes available. If we find that most sub-national agreements that qualify as treaties are authorized by the relevant State, it lends support to characterizing sub-national units as mere agents of the State.[59] Conversely, however, if we find that States have failed to authorize most sub-national agreements (and those agreements are otherwise treaties) it may build support for recognizing independent legal personality for at least some sub-national units.

B. The Capacity to Make Political Commitments

39. Although scholarship has tended to focus on political commitments among States, it has largely done so for practical reasons.[60] Since political commitments are defined as

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states from making "treaties." U.S. CONST. art. 1, § 10, cl. 1 ("No State shall enter into any Treaty"). But that prohibition has been interpreted to apply only to those agreements labeled "treaties" under the U.S. Constitution (those receiving the advice and consent of the U.S. Senate) *not* all treaties within the international law sense of that term.

[52] Duncan B. Hollis, "Unpacking the Compact Clause", 88 Tex. L. Rev. 741 (2010); Duncan B. Hollis, "The Elusive Foreign Compact", 73 Mo. L. Rev. 1071 (2008).

[53] *See, e.g.*, AUST, *supra* note 35, at 48-49.

[54] *See* "Role of Individual States of the United States: Analysis of Memorandum of Understanding Between Missouri and Manitoba," 2001 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, § A, at 179-98.

[55] Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

[56] Canada, for example, denies international legal effect to Quebec's ententes, while France has regarded them as binding under international law. *Id.* at 242, 250-51.

[57] Lissitzyn was the first to pose this question. See Lissitzyn, *supra* note 46, at 15.

[58] Self-Governing and Non-Self-Governing Territories, *supra* note 50, at 431 ("the Federal Government is responsible internationally for the affairs of the territories and commonwealths in precisely the same manner as for the states of the Union. Thus the Federal Government is held responsible for meeting commitments relating to them and for ensuring that the obligations of other nations towards them are met."); *but see* Díaz, *supra* note 54, at 111 (noting Mexico does not view sub-national international agreements as binding on the Mexican federation)

[59] There is some evidence that, on occasion, nation States may step in to ratify an agreement. *See, e.g.*, Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11,088.

[60] *See* Hollis and Newcomer, *supra* note 24, at 521.

agreements that are *not* treaties or contracts, they are not subject to the capacity limitations on binding agreements. Thus, at present, it appears there are no limitations on which actors may conclude a political commitment; they can be made between and among all sorts of actors and entities. For example, in 1999, the Andean Community—an international organization—concluded a political commitment with Canada on Trade and Investment Cooperation.[61] Similar evidence exists of non-binding agreements involving sub-national units, such as the Oil Spill Memorandum of Cooperation involving British Columbia and several U.S. States.[62] And we've already seen several examples of agency-level political commitments like the 1998 NASA-AEB Agreement or the 2008 MOU between the U.S. Department of the Interior and Environment Canada on Shared Polar Bear Populations.[63] Indeed, there is nothing about political commitments that limits them to public actors—private firms or non-governmental organizations presumably may negotiate and conclude political commitments as well. Thus, the Committee might consider recommending the political commitment form in circumstances calling for an agreement among a mix of public and private entities.

C. The Capacity to Make Contracts

40. Contracting capacity is a function of the law of the contract. Domestic legal systems each have their own rules for who can form a valid contract. As such, whether a foreign State (or agency, or sub-national unit) can conclude a contract will depend on a domestic legal analysis of the applicable law (that is, the law selected by the parties, or, in appropriate circumstances, the governing law determined according to conflicts of law principles).

III. Effects: What Consequences follow the Existence of an International Agreement?

A. Treaties: Legal and Non-Legal Effects

41. The primary effect of a treaty's existence lies in the principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[64] Thus, a treaty's primary effects lie in its own terms. States must conform their behavior to whatever the treaty requires, prohibits, or permits. And if the treaty provides vehicles for its own enforcement—e.g., the American Convention on Human Rights—States are obligated to accept these as well. Moreover, as a matter of domestic law, many treaty texts (if approved in accordance with the appropriate domestic procedures) can have the same legal effects as a statute, or even in some cases, a constitutional provision.[65]

42. Beyond the treat text, there are at least three additional sources for generating effects from a treaty: (i) the law of treaties, (ii) acts of retorsion, and (iii) the law of State responsibility. Where an agreement is a treaty, all the VCLT's rules apply, including those on validity, interpretation, application, breach, and termination. For example, VCLT Article 29 provides that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." This provision creates room, *if* all the parties agree, for treaties to contain "federal" or "territorial" clauses that allow a State

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[61] Trade and Investment Cooperation Arrangements between the Government of Canada and the Governments of the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) (May 31, 1999), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2488.

[62] Oil Spill Memorandum of Cooperation (between Alaska, British Columbia, California, Hawaii, Oregon and Washington), May 8, 2001, available at http://oilspilltaskforce.org/wp-content/uploads/2014/06/2001-OSTF-Memorandum-of-Cooperation.pdf.

[63] See *supra* notes 27-28, and accompanying text.

[64] VCLT, art. 26. Some of a treaty's clauses—those on consent, provisional application, and entry into force—actually have legal effects before the treaty is in force.

[65] See, e.g., Argentina Constitution, *supra* note 48, art. 31 ("This Constitution, the laws of the Nation that as a result thereof may be enacted by the Congress, and treaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain ..."); *id.,* art. 75(22) (giving treaties on human rights "standing on the same level as the Constitution"); Constitution of Peru, art. 55, *English translation available at* https://www.constituteproject.org/constitution/Peru_2009#s202 ("Treaties formalized by the State and in force are part of national law.").

to designate to which sub-national territorial units a treaty does (or does not) apply.[66] On the other hand, it is also possible for States to refuse any territorial clauses, as they have in many human rights treaties, insisting that States parties must apply the treaty across the entire territory.[67]

43. The VCLT also authorizes termination or suspension of a treaty by an affected party in response to another party's "material breach."[68] In addition, States always remain free to engage in acts of *retorsion* – unfriendly, but intrinsically lawful behavior that a State might perform to incentive the breaching State back into treaty compliance. For example, a State may opt to halt the provision of financial assistance (which it otherwise has no obligation to provide) to a State in response to that State's treaty breach.

44. Beyond the VCLT and retorsion, the laws of State responsibility, detailed in the 2001 Draft Articles on State Responsibility ("ASR"), provide additional remedies for internationally wrongful acts, which include treaty breaches. Most notably, the ASR affords States the right to engage in "countermeasures"—unlawful acts that are justified (i.e., lawful) because that State was negatively impacted by the prior internationally wrongful act.[69] By authorizing otherwise unlawful behavior in response to a treaty breach, countermeasures provide treaty-makers with a significant remedy that is unavailable for either political commitments or contracts.

45. Moreover, the ASR also provides additional—and perhaps dispositive—guidance on the question of where legal responsibility lies for treaty-making by government agencies and sub-national units. Article 4(1) provides:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.[70]

Thus, international law suggests that, when a government agency or sub-national unit concludes a treaty, international law attaches responsibility to the State as a whole.

B. The Effects of a Political Commitment

46. Unlike treaties, political commitments do not trigger any particular legal regimes; neither the law of treaties nor the ASR apply to these agreements. But it would be a mistake to assume this means that political commitments have no effects. Political commitments can be quite credible, exerting a conformance pull on participants whether because of the political context in which they exist, or more generally, the moral force of any promise. Thus, political commitments can directly affect State behavior, as, for example, the commitments of the Financial Action Task Force to combat terrorist financing.[71] And even though political

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[66] *See, e.g.*, UN Convention on Contracts for the International Sale of Goods (CISG) (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3, Art. 93(1); European Convention on Human Rights (ECHR), Art. 56(1); Constitution of the International Labour Organization (9 October 1946) 15 UNTS 35, Article 19(7).

[67] International Covenant on Civil and Political Rights ('ICCPR') (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 50; American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 June 1978) 1144 UNTS 123, art. 28(2).

[68] VCLT Art. 60.

[69] ILC, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts" in *Report on the Work of its Fifty-first Session* (3 May-23 July, 1999), UN Doc A/56/10 55 [3] ['ASR']. The ASR requires all countermeasures to be temporary, reversible, and proportionate (in the sense of being commensurate with the injury suffered). Moreover, countermeasures cannot violate *jus cogens*, nor can they unsettle prior dispute settlement resolution agreements.

[70] *Id*; see also ASR, art. 4(2) ("Any organ includes any person or entity which has that status in accordance with the internal law of the State.").

[71] *See, e.g.*, The Financial Action Task Force (FATF), *at*

commitments can be short-lived, others—e.g., the Helsinki Accords—have proved quite durable.[72]

47. Moreover, political commitments can generate political effects; the same acts of retorsion States frequently employ to restore compliance for a treaty breach are available for the violation of a political commitment. Indeed, other than countermeasures, the possible consequences from a political commitment violation may not differ too much from treaties. For example, when North Korea reneged on its political commitment to suspend uranium enrichment, the United States suspended aid it had promised to provide under the commitment and encouraged international sanctions.[73]

48. More importantly, although political commitments are not binding, they can sometimes still have legal effects, albeit indirectly. Some political commitments—e.g., the Kimberly Process on Conflict Diamonds, the Wassenaar Arrangement—may have their terms codified into domestic law.[74] There is even a possibility where political commitments generate legal effects under international law. If the circumstances of a political commitment cause others, to rely on certain behavior by a State, the principle of good faith could create a circumstance where that State is estopped from changing its behavior. Although there are no clear examples in international practice to date, it is the same principle that explains the binding force of unilateral declarations. As such, there is no reason it could not apply to at least some political commitments. [75] In such a case, the "non-binding" nature of a political commitment might therefore prove misleading. The matter remains open to debate, however, and might be an appropriate topic for the Committee to address if a consensus position is possible.

C. Effects of a contract

49. As with questions of capacity, the primary effects of a contract will depend on the relevant domestic law. Domestic contract law delineates whether and how contracts will operate as well as the available remedies for breach, including judicial means. As with political commitments, however, a contract breach could generate international consequences. Given the right circumstances, a State might engage in retorsion. It is also possible to envision that a contract could create conditions for reasonable reliance that might generate the same estoppel arguments discussed above in the political commitment context.

IV. Procedures: How do States Authorize Binding and Non-Binding Agreements?

50. Just as states must determine how to resolve the substantive questions about binding and non-binding agreements—how to differentiate them, who has the capacity to make them, and what legal (and non-legal) effects they generate—so too must States decide on appropriate procedures for their formation. What steps are required domestically for a State to conclude a binding or a non-binding agreement?

51. Of the three categories—treaties, political commitments, and contracts—the procedures are most visible (and developed) in the treaty-context. States generally assign the power to negotiate and conclude treaties to their executive whether the head of State (e.g., the Monarch), the head of government (e.g., the Prime Minister), or both (e.g., the President). Often, the power is further delegated from the Head of State to the Head of Government and from the Head of Government to the Foreign Minister.

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http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html (FATF issues "recommendations' that are non-binding, but which have become the global standard for combating money laundering and terrorist financing).

[72] *See* Helsinki Accords, *supra* note 22.

[73] Selig S. Harrison, *Time to Leave Korea?* FOREIGN AFFAIRS (Mar./Apr. 2001).

[74] See, e.g., Clean Diamond Trade Act, Public Law 108-19 (Apr. 25, 2003) (implementing the "Kimberley Process," which included a political commitment to regulate trade in conflict diamonds); Wassenaar Arragenment, *at* http://www.wassenaar.org.

[75] *See, e.g.*, Schachter, *supra* note 36, at 301 (suggesting estoppel might apply where there is a gentleman's agreement and reasonable reliance on it); Aust, *supra* note 36, at 807, 810-11 (suggesting estoppel may apply to certain political commitments, but not mere statements of political will).

52. Moreover, States regularly require the Executive to coordinate the making of at least some of its treaties with various other governmental actors (e.g., the legislature, the courts, sub-national units, or even the general populace via a referendum). The specific procedures vary from State to State, with some procedures mandated by law (e.g., constitutional distributions of authority).[76] In other cases, the procedures have emerged as a "political" practice. In Canada, for example, although the Prime Minister could make a treaty on any subject, there is a practice of refraining from consenting to treaties that require implementing legislation until that legislation is enacted.[77] For States like the United States, law and practice have mixed to create no less than four different procedures for establishing when the Executive may consent to a treaty: (1) following the advice and consent of two-thirds of the U.S. Senate; (2) in accordance with a federal statute (enacted by a simple majority of both houses of Congress); (3) pursuant to those "sole" powers possessed exclusively by the Executive; and (4) where a treaty is authorized by an earlier treaty that received Senate advice and consent.

53. States may also impose notification requirements for those treaties that the Executive can conclude without legislative (or judicial) involvement. This way the legislature is apprised of what treaties the State is concluding independent of its own approval processes. Some States like the United States have even devised procedures to coordinate treaty-making *within* the Executive branch, including by government agencies. The "Circular 175" (C-175) process implements a provision of U.S. law restricting U.S. Government agencies from signing or otherwise concluding international agreements unless they have first consulted with the U.S. Secretary of State.[78] These procedures (which usually entail a memorandum to the Secretary of State or his designee cleared by all relevant offices and other government agencies) fulfil several functions. First, and foremost, they confirm that the proposed agreement will constitute a treaty (in the international law sense of that term). They also review the agreement's contents to ensure it can be carried out within U.S. constitutional and other statutory limits. And, they detail what, if any, consultations are necessary with the U.S. Congress as well as what particular method of authorization will be used before the United States joins the treaty. Interestingly, the C-175 can be used to approve the negotiation or conclusion of a single agreement or whole classes of binding commitments. It is not clear, however, whether other States have similar procedures or practices in place, let alone their effectiveness. I would be happy to make a copy of these procedures available if the Committee believes they could be of further use.

54. If there is a lack of information on the full range of approval procedures for treaties, there is a *vacuum* of data on political commitments. I am unaware of any formal procedures States use to coordinate the negotiation and conclusion of political commitments. Indeed, one of the reasons political commitments are so popular among States is that they are perceived to be entirely free from any domestic procedural requirements.[79] The problem with this approach,

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[76] In prior scholarship, I noted at least four different approaches to legislative involvement in treaty-making. First, many states require that the entire legislature (i.e., one or both chambers, depending on the state's system) give its approval to a treaty. For a second group of States, both chambers of the legislature participate in the approval process, but one does so with greater rights than the other. A third approach involves having only one of the two legislative chambers give its approval, as in the United States or Mexico where the Senate approves some or all treaties, respectively. Fourth and finally, for those states focused on legislative implementation instead of actual approval (e.g., Canada), the implementing legislation follows normal parliamentary procedures. Hollis, *supra* note 7, at 36.

[77] Copithorne, *supra* note 24, at 95-6.

[78] The Case-Zablocki Act, 1 U.S.C. §112b(c). ("Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.") The C-175 process itself involves the Secretary of State authorizing the negotiation and/or conclusion of one or more international agreements by the State Department or another U.S. government agency. A copy of the C-175 procedures can be found at https://fam.state.gov/FAM/11FAM/11FAM0720.html.

[79] See Charles Lipson, "Why are Some International Agreements Informal?" 45 Int'l Org. 495, 508 (1991); Kal Raustiala, "Form and Substance in International Agreements" 99 Am. J. Int'l L. 581, 592 (2005).

however, is that we are left in a situation where we know very little about whether and how States are concluding these agreements. We have no good resources on which States are pursuing political commitments, what procedures (if any) they employ to coordinate their conclusion, how often they do so, let alone what sorts of subjects and commitments they do (or do not) contain. It is this lack of information about the procedures for non-binding agreements that drives, at least in part, the recent calls by Member State Legal Advisers for the Committee to take on the topic of binding and non-binding agreements.

55. In contrast, there does appear to be several existing programs in place that lay out procedures for contracting among States. The United States, for example, has a foreign military sales program that includes a program with instructions on the requirements and steps to be followed.[80] Although I have not researched these procedures extensively, I am also not aware that there is any perceived problems with these agreements in the same vein as questions over differentiating and approving treaties and political commitments.

Conclusion: Recommendations and Caveats

56. In this preliminary report, I have attempted to explore the three major categories of international agreement—treaties, political commitments, and contracts—along four distinct lines of inquiry. First, in terms of differentiation, I have identified the criteria for each agreement type and discussed methods for identifying the particular type of agreement reached (whether the dominant, "manifest intent" test or the ICJ's suggestion of a more "objective" analysis). Second, I reviewed who has the capacity to conclude international agreements beyond the State itself. Both government agencies and sub-national units may conclude treaties where they are authorized to do so by the responsible State *and* potential treaty partners consent to their participation. In contrast, there appear to be no limits on who can make political commitments while most States' domestic law will determine who has contracting capacity. Third, I've examined the legal effects of all three agreement types, noting both the legal (e.g., *pacta sunt servanda,* law of treaties, countermeasures) and political (e.g., retorsion) consequences that may flow from a treaty's existence. Political responses may also follow political commitments although there is the additional possibility that, under the right circumstances, a political commitment may trigger a legal claim of estoppel under international law. State-to-state contracts may do so as well, although the more likely effects are to be found under the domestic law selected. Finally, States may—and regularly do—dictate specific procedures for authorizing treaty-making and contracts. Political commitments, in contrast, appear to have few, if any, existing procedures for their formation.

57. This report has also identified a number of areas where there is ambiguity in international law or a division of opinions. Thus, there is room for the Committee to improve Member State practices by proposing some general principles and/or best practices for the approval of the OAS General Assembly. I would recommend that the Committee consider one or more of the following ideas as potential general principles relating to binding and non-binding agreements:

i) Defining each of the three categories of international agreements – treaties, political commitments, and contracts;
ii) Endorsing the idea that the type of agreement concluded will depend on the mutual, manifest intent of its authors;
iii) Proposing a default presumption that an international agreement among States or entities affiliated with a State (e.g., government agencies, sub-national units) will constitute a treaty where there is no shared manifest intentions to the contrary. This presumption could be overcome if there is evidence that the parties intended to constitute either a contract binding under one or more domestic legal systems or a political commitment;
iv) Offering a two-part test for determining whether an entity affiliated with a State such as a government agency or sub-national unit may conclude a treaty: (i) "internal" authorization from the State with which the entity is affiliated to negotiate and conclude treaties on subjects within the entity's competence; and (ii) the "external" consent of the potential treaty partners to the entity's participation.

[80] See FMS Program, *supra* note 26.

The Committee could also articulate the legal consequences for any "unauthorized" agreements that fail this test;

v) Affirming that legal responsibility for any treaties concluded by an entity affiliated with the State runs to the State as a whole;

vi) Endorsing the use of political commitments when the agreement requires flexibility or the participation of non-State actors;

vii) Denouncing the use of political commitments where the primary purpose is to avoid domestic procedures for authorizing the State's conclusion of an international agreement; and/or

viii) Taking a position on the question of whether a political commitment can give rise to conditions of estoppel under international law.

58. In addition, I recommend that the Committee consider developing a set of best practices on one or more of the following issues related to binding and non-binding agreements:

a) To suggest that States or other entities should be explicit about the type of agreement intended in the text of the agreement to avoid confusion about its status as a treaty, political commitment, or contract;

b) To offer a list of criteria that States should use to manifest their intent to create a treaty, including terminology (e.g., "shall") and clauses (entry into force, third party dispute settlement) that should be reserved for treaties;

c) To offer a list of criteria that States should use to manifest their intention to create a political commitment, including the terminology (e.g., "should") that is not indicative of a binding agreement;

d) To offer a list of criteria that States should use to manifest their intention to create a contract, including a governing law clause whenever possible;

e) To offer a set of model procedures States may use to organize the authorization and oversight of agreement-making within a government, including by government ministries or sub-national units; and/or

f) To identify conditions under which a political commitment might be more appropriate than a treaty or vice versa.

59. The foregoing analysis and recommendations come, however, with at least three, key caveats. First, I suffer from incomplete information. Although most Member States have formal constitutional or other regulatory structures for some of their international agreements, that information often fails to fully capture the actual State practice. In the United States, for example, the Constitutional text (Article II, cl. 2, sec. 2) suggests only a single procedure for treaty-making—ratification following the advice and consent of a more than two-thirds majority of the U.S. Senate. That text, however, does not convey either the Senate's limited advisory role or, more importantly, the emergence of the three other alternative mechanisms I described above for authorizing the conclusion of treaties under international law. Thus, the Committee might prefer to obtain more information on Member State laws and practices (whether through further research or responses to the proposed questionnaire) before agreeing on any general principles or best practices.

60. Second, on some issues, the law and practice remains unclear. For example, the legal effects, if any, of non-binding agreements remain underdeveloped. This creates opportunities for the Committee to participate in the progressive development of international law. And some of my proposed general principles and best practices clearly would do so. At the same time, however, the Committee might benefit from knowing what opinions, if any, Member States have on how the law should develop or what procedures they might find most useful before proceeding to develop these ideas further.

61. Third, and finally, I need more guidance on how to prioritize among the various issues relating to binding and non-binding agreements. This preliminary report offers a broad view of a very important and complex set of issues. Given sufficient time and space, we could, of course, produce a document that contains guiding principles and best practices across all the topics discussed in this report. It is not clear to me, however, if Member States would equally value such efforts. We might be better served to prioritize work on those aspects of these issues that Member States indicate are most important or where the Committee's work is most likely to add value to the existing international legal discourse.

62. Taken together, these three caveats lead me to conclude this report with a recommendation: that our next step should be to approve and send a questionnaire to Member States to gain more information on (i) their existing law and practice, (ii) what preferences or opinions they may have on open questions, and (iii) what priorities they have for addressing the topic of binding and non-binding agreements. I propose a draft of such a questionnaire in the Appendix.

63. I look forward to the Committee's reactions and guidance on these subjects.

APPENDIX

DRAFT QUESTIONNAIRE ON
BINDING AND NON-BINDING AGREEMENTS

At the 89th Regular Session of the Inter-American Juridical Committee, the Committee held an inaugural meeting with legal advisors to the Foreign Ministries of Member States, including those from Brazil, Chile, Mexico, Paraguay, Peru, United States, and Uruguay. At that meeting, several Member States suggested that the Committee should study the law and practice of binding and non-binding international agreements. The Committee agreed to take up the topic and, as a result of its initial work, has identified three categories of international agreements for its attention – treaties, political commitments and state-to-state contracts. In particular, the Committee is focused on improving the ability of Member States to differentiate binding from non-binding agreements and to identify the relevant status and appropriate procedures for international agreement making by government agencies and a State's sub-national territorial units.

The current questionnaire is needed for the Committee to perform its work. At present, the Committee lacks sufficient information on Member State practices, preferences, and priorities. First, much of the existing practice within Member States on organizing and approving agreement-making is not public or easily obtainable. The Committee would benefit immensely from further information from the Member State's treaty office or other relevant government officials on its existing law and practice relating to international agreements. Second, there are a number of areas where the Committee is considering recommendations that would take a position on open questions of international law. As such, the Committee could benefit from Member State preferences on how to resolve existing ambiguities in international law. Finally, the Committee would like to make its work as relevant to Member State concerns as possible. Thus, this Questionnaire asks Member States to prioritize among issues relating to binding and non-binding agreements to better inform the Committee's own future work. The following questions are grouped around these issues of practice, preferences, and priorities.

I. How do you differentiate among treaties, political commitments and contracts? How does your State define treaties under international law? Do you have a practice of concluding "non-binding" agreements (often called political commitments or memorandum of understanding)? If so, how do you define such agreements? Do you have a practice of using contracts governed by domestic law in reaching binding agreements with other States, and, if so, how do you define these contracts? Beyond these definitions, do you use specific terminology or include specific clauses to differentiate among various types of binding and non-binding agreements?

II. Who has the capacity to conclude binding and non-binding agreements? Under your national law, can ministries and government agencies conclude treaties governed by international law? Under your national law, can sub-national territorial units like states, provinces or municipalities conclude treaties governed by international law? Do your agencies and sub-national units ever conclude non-binding agreements or contracts? How does your national law or practice deal with agreements made by an agency or a sub-national unit that were not authorized by the national government?

III. What are the legal effects of your binding agreements? For any treaties governed by international law concluded at the agency level or by sub-national territorial units, where does international legal responsibility for the performance of those agreements lie

– with the concluding party or the State as a whole? Should the State bear responsibility for an agency or sub-national unit's agreement even if those entities did not follow the appropriate domestic procedures before concluding the agreement? How, if at all, does your state regard the legal effects of non-binding agreements or contracts done at the agency or sub-national level?

IV. What are your National Procedures for Making Binding and Non-Binding Agreements? What are your internal procedures for deciding whether and when a treaty negotiation may commence or be concluded? If you have a practice of doing binding agreements under international law with agencies or sub-national units, what domestic procedures exist for these entities to receive authorization to negotiate and conclude such agreements? What, if any, procedures do you have for the conclusion of political commitments?

V. Priorities: Of the aforementioned topics, does one (or more) of them pose a greater problem for your State than the others? Would you appreciate a set of general principles or best practices on issues of differentiating among binding and non-binding agreements, the capacity to conclude such instruments and/or the procedures employed to do so?

7. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards

At the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Ruth Stella Correa Palacio proposed the addition of a new topic titled: "Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards."

The plenary accepted the proposal which was added to the agenda, and Dr. Correa, the Rapporteur designated, pledged to provide a report for the next session.

* * *

8. Immunity of States

Document

CJI/doc. 530/17 Immunity of States: scope and validity
(Presented by Dr. Carlos Mata Prates)

During the 81st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012), Dr. David P. Stewart proposed to the plenary that the Committee work on an instrument addressing the immunity of States in transnational litigation. He pointed out that in 1986 the Committee had presented a draft convention on the immunity of States that did not prosper. He also observed that the United Nations Convention on the jurisdictional immunities of States and their assets is not in force yet. Furthermore, he noted that States lacked appropriate legislation. In his explanation, Dr. Stewart described the positive implications that an instrument in that area could have for trade, in addition to providing guidelines for government officials. Dr. Fernando Gómez Mont Urueta proposed that the plenary agree to designate Dr. Carlos Mata Prates as Rapporteur for the subject: a proposal met with the plenary's approval.

At the 82nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2013), the Rapporteur for the topic, Dr. Carlos Mata Prates, explained that his report would be presented to the regular session of Committee in August 2013. He then engaged in a general reflection. He explained that the purpose of the Rapporteurship's work was to restrict it to States and international governmental organizations, which are subject to International Law, although he was aware that the element of immunity would pertain to institutions, officials, and places, including embassies or warships. In his presentation, he noted that the treatment of acts or deeds attributable to a state cannot be tried by a domestic court of another state.

The Rapporteur expressed appreciation for the proposed *questionnaire* prepared by Dr. David P. Stewart, which was sent to the States. Furthermore, noted the important role of tribunals, citing the Law of the Sea Tribunal case between Argentina and Ghana, relating to immunity of an Argentinean warship from jurisdiction (immunity derived from the Law of the Sea Convention).

With regard to international organizations, the Rapporteur explained that immunity is conferred by rule as established in headquarters agreements. He also cited a domestic court decision concerning ALADI officials.

The Chairman asked Dr. Stewart to present his *questionnaire*. Dr. Novak urged the Rapporteur to include national practices. Dr. Gélin Imanès Collot proposed that the Rapporteur include in his document references to the 2005 Convention on Immunities of States.

Dr. Moreno Guerra proposed that elements on waiving sovereign immunity should be included and should be distinguished from cases in which sovereign immunity is maintained in order to monitor trials involving nationals. The Rapporteur cited cases in which a State by its action loses its immunity or cases in which disputes are taken to arbitration.

The Department of International Law circulated that questionnaire to the permanent missions to the OAS, through Note OEA/2.2/26/13 of April 26, 2013.

At the 83rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2013), the Rapporteur for the topic, Dr. Carlos Mata Prates, was not present and no report was sent for the consideration of the Committee. Regarding the *questionnaire* Dr. Luis Toro Utillano provided an explanation on the situation of its responses. He stated that so far there had been six responses, from the following governments: Bolivia; Colombia, Costa Rica, Mexico, Panama and Dominican Republic. In addition, he consulted the Plenary whether a reminder should be sent to the States that had failed to respond. Dr. Fabián Novak suggested the issuance of a reminder involving all the themes, and that the final date for the delivery of the responses could be scheduled for December 15, 2013.

During the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), the Rapporteur, Dr. Mata Prates, decided to bring forward a part of the report he was

preparing, and provided some background to the Committee's work on the issue. Citing studies conducted between 1971 and 1983, he explained that his report would build on previous work and would revisit the status of those concepts. An analysis of the replies received, from 10 countries altogether, would be included.

He concluded by explaining that based on the ten responses received, none of the States had ratified the UN Convention on Jurisdictional Immunity, and that only one had a parliamentary process underway with a view to said ratification.

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2014), Dr. Carlos Mata Prates, the Rapporteur for the issue, reviewed the background and acknowledged that one more State had responded, totaling 11 States.

Dr. Novak mentioned that both topics were very broad, so that he suggested restricting the subject for the moment to the issue of the immunity of States. He also suggested that perhaps Dr. Stewart could join Dr. Mata Prates.

The Chairman, Dr. Baena Soares, mentioned that the subject of the immunity of international organizations should not be neglected, especially the experience of the States hosting them. Additionally, the Chairman ascertained a consensus among those present about addressing the issue of the immunity of States first.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2015), the Rapporteur for the Topic, Dr. Carlos Mata Prates, recalled that this subject has been on the Committee's agenda since August 2012 and that his role had been confined to addressing immunity of States, though no new responses to the *questionnaire* have been received from the States.

As a preliminary finding, the Rapporteur noted that a narrow concept of immunity has been established with regard to States. Notwithstanding, he explained that he would still have a methodological question about how to continue with preparing the report, inasmuch as there weren't enough responses to put together an overview of the practices in the countries of the Americas; that is, only 11 countries responded.

Dr. Hernández García advised the Rapporteur to take into consideration in his study the failure of States in the Region to sign the United Nations Convention on Jurisdictional Immunities of States and their Property (2005), and commented on the proceedings before the Federal Senate of Mexico to move toward ratification of the aforementioned Convention. He also confirmed the tendency of courts to resort to international customary practice, inasmuch as domestic law provides no legal basis in this area of law. As for practice in Mexico, not many cases of immunity of States have been brought in the country's courts; while, in contrast, there has been a higher number of cases on immunity of International Organizations.

Dr. Salinas suggested integrating the practices of the countries into a comparison, but using a theoretical basis to explain the status of the subject matter in International Law. Additionally, he recommended conducting a comparative analysis of the differences between the 2005 United Nations Convention and the 1983 Draft Inter-American Convention on Jurisdictional Immunity of the States, and then carrying out an analysis of actual practices in the States.

Dr. Hernández García suggested creating a legislative guidance on implementation of the United Nations Convention in order to explain the best way to move toward possible ratification of said instrument.

Dr. Mata Prates pointed out that the theoretical issue is not problematic; judges apply customary law, except in the United States, where a specific law has been enacted. Therefore, it is essential to know the decisions of national judges on said issues.

During a second meeting devoted to discussion of the topic, Dr. Mata Prates introduced a preliminary report titled "Immunity of States. Preliminary Outline," document CJI/doc.480/15, which includes potential findings and expected outcomes. The report traces over time the

development of immunity of States, and how it became relative, and that reflects a division between jurisdictional immunity and immunity from execution of judgment.

Dr. Correa suggested including in the Rapporteur's outline a part on responsibility of the State for damages occurring as a result of the aforementioned immunities.

Dr. Salinas asserted that the theoretical framework of said report ought to refer to the Inter-American Convention on Jurisdictional Immunity of States, and proposed that the Rapporteur indicate whether or not ratification of said Convention should be encouraged or discouraged, based on the findings of his study.

Dr. Moreno Guerra noted that it is not the Committee's mandate to urge States to ratify or not to ratify a Convention. In this regard, the contribution of the Committee is to provide guidance to address said issues, taking into account all stakeholders involved.

The Chairman reiterated the commitment of the Rapporteur to submit a report during the August meeting as a final product.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2015), the Rapporteur for the topic, Dr. Carlos Mata Prates, provided a summary on the history of the Juridical Committee dealing with the topic, which originally included immunity of International Organizations. He submitted the new document (CJI/480/15 rev.1), which mentions the background history of addressing this topic in the universal system (United Nations Convention on Jurisdictional Immunities of States and Their Property - 2005) and in the Inter-American System (Draft Inter-American Convention on the Jurisdiction of States). He affirmed that these draft Conventions have not come into force in either of the two systems. This is because the United Nations Convention does not meet the required minimum number of ratifications and the Inter-American Convention has not become an international instrument.

As for the scope of immunity, he believed that the concepts have been viewed narrowly because of a distinction drawn between acts of administration and acts of authority, the latter being covered by immunity, while the former would not be. He emphasized as well that the subject of labor is an exception to jurisdictional immunity.

With regard to the *questionnaires*, he noted that responses have been received from 12 countries, eight of which reported that they have no specific legislation on this subject matter. All States made reference to standards of customary law pertaining to jurisdictional immunity. Moreover, the concept is confined to commercial activities (*jus gestioni*). The definition of said acts, in most States, is based on a particular judge's own assessment on a case-by-case analysis and not based on any specific statutory definition.

In his report, the Rapporteur expressed his intention to pursue the following courses of action: ascertain the status of the scope of said immunities; clarify the degree of consistency of each case with the Conventions adopted within the UN and the OAS; and, draft recommendations on ratification of one of the two Conventions, in order to determine a way forward (propose amendments to the American Convention, draft guiding principles, etc.).

Dr. Salinas expressed interest in the Committee's ability to add enhanced value and, therefore, the work should not be confined to just legal instruments, but should also include Court decisions and standards of customary law.

Dr. Stewart considered that the work of the Rapporteurship must aim to determine the status of prevailing law in the Hemisphere. It is not the job of the Committee to promote ratification of the Convention, even though it believes it is a worthy document. We must endeavor to produce a more detailed analysis on the situation in the countries. If it were to be established that the sphere of International Law takes precedence, there should be a way to explain this claim.

Dr. Correa confirmed the deep judicial roots of this topic and believed that efforts could involve narrowing the scope of the exceptions, in addition to providing input on the responsibility of States. She urged the Secretariat to promote a greater response to the *questionnaires* and the Rapporteur to prepare guidelines.

Dr. Collot posited two levels of immunity (jurisdictional immunity and immunity from execution of judgment), and expressed his interest in implementation of these types of immunity in the proper way and, for this purpose, the immunities must be thoroughly comprehended. Lastly, he mentioned the need to distinguish between immunity and impunity.

The Rapporteur explained that the mandate was to establish the current situation in the Hemisphere. Even though few responses have been submitted, it can be asserted that jurisdictional immunity is clearly governed by customary law on the subject matter, except in the United States, where a very comprehensive national law is in force on the subject matter. This assessment is based on rulings of national courts: national judges do not apply a statute, but rather legal precedents and, hence, the difficulty in providing a response to the questionnaire, which would require an examination of the legal precedents of each country. With regard to Dr. Collot's comment, if the country of origin declines to accept jurisdiction, a connection must be sought to the place where the events took place. Likewise, a distinction must be drawn between jurisdictional immunity and immunity from execution of judgment; the former being governed by a restrictive criterion, while in the latter, is absolute. Lastly, on the subject of international crimes, it must be taken into account that the Rome Statute does not allow jurisdictional immunity for individuals, who are responsible for the four crimes over which said Court has jurisdiction.

He suggests that the topic be left open in anticipation of further responses from the States.

Dr. Stewart asked for the *questionnaire* to also be sent to experts in the countries from which no affirmative response has been received.

The Rapporteur agreed with the suggestion of seeking out experts, who could address the topic.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington, D.C., April, 2016), the Rapporteur for the Topic, Dr. Mata Prates, recalled the agreement reached at the August session of the previous year that a final report would not be adopted due to the insufficient number of responses to the *questionnaire*, and given that the practices of the States could not be determined.

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), the Rapporteur stated that during the session held in August 2015, the Committee suggested to keep the topic in suspense because the number of responses received from States was very low. However, according to the Ministries of Foreign Affairs, this is a daily issue and some judges are beginning to consider that there is a kind of customary law in this regard.

He took up again the discussion held on the previous meeting with representatives of the Ministries of Foreign Affairs. Some legal counsels suggested drafting a guide with information on practical aspects. He proposed then to reformulate the mandate of the Rapporteurship with the aim of drafting a guide on immunity of jurisdiction and enforcement by the States.

Dr. Salinas highlighted the emphasis stressed on the topic by the legal counsels, and the convenience of hearing an opinion from the Juridical Committee on the practice of States on this issue.

Dr. Hernández García pointed out that this was a perfect opportunity for studying the topic, in view of the interest shown by the legal counsels. However, the responses from States shall not provide the perfect solution in these cases. Without referring to the nature of the document, interesting issues refer to practical guidelines used as a reference. Three topics deserve the attention of the Committee:

1. The issue concerning notices/notification;
2. Immunity from execution;
3. In labor matters to find mechanisms that allow access to justice, because immunity from execution does not mean exception of payment.

He proposed a draft guide making an inverse exercise, and before delivering it to the political organs, it would be convenient to also send it to the seven counsels that met with the Committee, thus being able to approve the final report at the end of the process.

Dr. Baena Soares was in agreement with the idea of working with the information available, and referred to the positive result of the meeting with the counsels held on the previous day. Finally, he urged the Rapporteur to draft a guide in the format of a practical response.

Dr. Correa said it would be convenient to go beyond a study on the practices of States, as this would be an insufficient limitation, taking into consideration that there is a core problem related to the need of imposing respect for international law between judges. The Committee should explain how these limits will be implemented, always respecting the independence of the courts, because in the labor area, for example, restrictions of immunity from execution are not clear enough.

The Chairman said that he was in agreement with the proposal made by Dr. Hernández García about a practical guide. He mentioned a Peruvian example, as people fail to understand immunities of individuals and the reasons for such protection.

Dr. Moreno suggested contacting the judges, in the light of the experience of the Department of International Law in the area of training, by means of cooperation agreements involving the OAS and the Juridical Committee.

The Chairman informed that the discussion appears in the previous phase, as it is like having a product and not disclosing it.

Dr. Hernández García commented that nobody would dare to amend the conventions in the sense of an exception to the immunities of jurisdiction. Therefore, it is necessary to support the practical recommendations on the guide on a basis of normative support. He also explained that his intention is to monitor progress in a practical document, based on the decisions of the domestic courts.

He proposed coordinating his work together with the work of Dr. Mata Prates, so that both guides are coherent. He finally noted that many countries do not require a law on immunities, as the convention is enough. In this regard, he is considering drafting a guide containing general principles.

The Chairman then proposed working on a practical instrument including the suggestion made by Dr. Correa and fulfilling the mandate, in all instances, with the responses of the countries that have provided one.

Dr. Salinas agreed with Dr. Hernández Garcia´s proposal, but was of the opinion that the report should determine the stage of the question, and after that drafting the guide.

Dr. Villalta observed that the meeting held on the previous day with the legal counsels has provided new light and information, and expressed her agreement with Dr. Moreno´s suggestion on the importance of training judges, together with some information about the use of immunities in El Salvador.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the subject Rapporteur, Dr. Carlos Mata Prates, presented his report titled “Immunity of jurisdiction of states: scope and validity,” document CJI/doc.530/17. On this occasion, reference was made to applicable provisions of law on the subject matter and to the jurisprudence of domestic courts. Also, responses to the questionnaire were received from States. The proposed conclusions include asking States to ratify any of the Conventions on the subject matter, and assess the preponderance of customary international law in the absence of any binding instruments in force.

Dr. Hernández asked for further explanation on the scope of the immunity described in paragraph 5 of the Rapporteur’s report, which appeared to be rather broad and would include diplomatic and consular staff, employees or officials, ministers, etc. If the scope were to be that

broad, he asked the Rapporteur what norm would be enforced by domestic courts. As per paragraph 35, the questionnaire responses indicated that courts enforce customary law. He asked the Rapporteur about the role of the Vienna Convention.

Dr. Mata Prates replied that he was considering jurisdictional immunity in the general sense, and that it could be applied to States and international organizations alike; but that his work was confined to the former case. He acknowledged that the Vienna Convention indeed would be applicable to diplomatic and consular staff. He further noted that questions about immunity would often arise for legal counsel at the foreign ministries. Whether in the litigation of an accident or the breach of a contract for sale of goods, the judge must first decide whether this was the act of management or of a sovereign. He also said that although the Committee seeks legal certainty, the classification was undetermined and decided on a case-by-case basis. He noted that the topic had been studied by both the Juridical Committee, which worked on the *Draft Inter-American Convention on Jurisdictional Immunity of States*, and by the UN, but that the instrument adopted by the UN, the "Convention on Jurisdictional Immunities of States and their Property," has not been ratified by a high number of States, even though it was well written and is still a fine instrument. Lastly, he added that the Committee could call upon States to adopt it, but that this would not trigger much change because customary law would continue to govern. In short, the Rapporteur concluded that the current status of the issue did not require new norms, in light of the conventions and customary norms.

Dr. Villalta said that this was a very important topic to courts and to legal departments, because in her experience judges ask for advice on this matter all the time. She found it unfortunate that so few countries had ratified the UN convention.

Dr. Hernández then asked the Rapporteur to add that Mexico has ratified the UN Convention.

The Chair thanked the Rapporteur on the subject and explained that the debate would be reflected in the annual report to enable the political bodies to review the results of the work. He then closed discussion on the topic.

The document submitted by Dr. Mata Prates in March 2017 is included below.

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CJI/doc.530/17

IMMUNITY OF JURISDICTION OF STATES:
SCOPE AND VALIDITY

(Presented by Dr. Carlos Mata Prates)

I. PRESENTATION

1. At its 81st Regular Session held in August 2012, the Inter-American Juridical Committee resolved to make an update study of the scope and validity of the Immunity of State Jurisdiction on the American continent.

2. At the afore-mentioned Regular session it was decided to appoint the undersigned as Rapporteur, which is the reason for this report. Allow me to point out that this is the third report since the Committee decided to postpone writing the final report while waiting to receive new answers to the questionnaire sent out to the American States.

3. In order to determine the scope of this report, let it be understood that the reason for this study is to show the status of the immunity of the States of America to date, rather than dealing with a doctrinaire study of this institute, which has a large bibliography on the matter. This being so, this paper presupposes the work carried out by the Inter-American Juridical

Committee for over ten years (from 1971 to 1983), work which terminated with the adoption of the Draft Inter-American Convention on the Immunity of States (1983).

II. INTRODUCTION

4. It can be asserted that the concept of immunity is the question that in principle deals with Immunity of the States – and should include inter-governmental international organizations as well as certain authorities (Heads of States and Governments, Ministers of Foreign Affairs and other State officers who represent, together with diplomatic and consular staff). Immunity of States also embraces military and public ships and airplanes, given the prerogatives assured by international law, including acts and occurrences that take place in military premises.

III. CONCEPT

5. When we refer to State immunity in its full meaning, we speak concretely of the fact that the acts or deeds dictated by same must not be the object of jurisdiction (comprising the stages of knowledge and execution) of an internal court of another State, since the principle of the old *Jus Gentium - par in parem non habet imperium jurisdictionem* is applicable*)* and consequently a State court must not in principle judge acts and deeds of another State, nor adopt coactive measures against its property.

6. The commentary that follows is based on the above concept.

IV. ANTECEDENTS

7. It should be borne in mind that the IJC, at its Regular session held on 11 March 1971, agreed *"to undertake a study on the immunity of States"* and that "*in the Regular session held on 10 January to 4 February 1983, the IJC adopted the Draft Inter-American Convention on State Immunity"*.

8. Also, within the scope of the United Nations, the Committee on International Law, following long years of study, prepared a draft treaty which was analyzed by the Sixth Committee of the General Assembly of the United Nations and later approved and passed for the appreciation of the Member States under the title *Convention on State Immunity and their Property (2005)*.

9. It is fitting to point out that neither the *Inter-American Convention on State immunity Inter-American Convention on State Immunity* nor the *Convention on State Immunities and their Property (2005)* are still valid, and both in fact show a scant amount of ratifications or adhesions.

10. Finally, it is easy to affirm that most of the American States, through their jurisdictional bodies, emit frequent opinions of the scope of State immunity.

V. APPLICABLE NORMS

11. It is currently accepted that most of the sources of PIL are to be found in article 38 of the Statutes of the International Court of Justice, as regards the treaties, common law and general principles acknowledged by the principal juridical systems, to which should be added the norms of *ius cogens*, unilateral acts, general principles of international law, etc.

12. In the case of Immunity of Jurisdictions of States, the main formal source applied is the international custom, although a few conventional norms exist, such as internal law.

VI. JURISPRUDENCE

13. It is interesting to note the evolution of this matter also in the jurisprudence of the international and national Arbitration Courts and Tribunals which to a great extent reveal how the institute has developed.

14. Allow me to recall a recent verdict of the Court of Sea Law on 15 December 2012 with regard to the case *Argentina vs Ghana*, where one of the principal aspects considered is the immunity of jurisdiction of a war ship (the training ship of the Argentina Armada fleet *fragata* Libertad) in the various maritime areas established in the Convention of Sea Law (1982).

VII. SCOPE

15. Finally, another aspect to consider refers to the scope of the institute, since this has developed over the years; at first, immunity was acknowledged to be absolute, whereas at present it is considered that the scope of State immunity is relative, and so the theory of *iure imperii* and *iure gestionis* acts was elaborated, whereby only the former were included in immunity.

16. This development of State immunity is clearly shown in the jurisprudence of national courts, as exemplified in the 90's by the Supreme Federal Court of the Federative Republic of Brazil in deciding that in labor questions, individuals contracted by Diplomatic Missions to provide administrative functions or service, if the case reached a national jurisdictional body it was not admissible for the State to file an exception of jurisdictional immunity since this would purely and fully imply a denial of justice, since it was improbable that the ex-functionary had the resources to open a case in the State where he was serving. In other words, in this case the principle of relative immunity of States was affirmed.

17. Likewise in respect to the immunity of international inter-governmental organizations, this is provided in the respective Headquarter Agreement, and to invoke this successfully in labor matters –that is to say in relation to the international organization with its functionaries – this should ensure the existence of an Administrative Court (Aladi, Mercosur, etc.) (There is a verdict of the Supreme Court of Justice of Uruguay that refers to a case filed by former functionaries of Aladi).

18. The same occurs with regard to leasing of property, traffic accidents, etc.

19. As can be seen, we are faced with an exceptionally important, constantly evolving and current topic that for deep analysis.

VIII. THEORETICAL FRAMEWORK

20. As a result of the above, and especially taking into consideration the introductory words, the theoretical framework for this paper is presented.

21. For better clarification we must state that the concept, scope and normative system encompassing the institute of Immunity of Jurisdiction of States represents the theoretical framework that is necessary for preparing this paper.

IX. METHODOLOGY

22. In order to analyze the current development on this issue a *Questionnaire on the Status of Immunity of Jurisdiction of States in the American Continent* was prepared, which was forwarded to the Member States of the OAS – Organization of American States.

23. Some comments are also made on the Inter-American Convention on Immunity of Jurisdiction of States and the 2005 United Nations Convention on Jurisdictional Immunities of States and Their Property, and especially on the compatibility between them.

X. ANALYSIS OF THE RESPONSES TO THE QUESTIONNAIRE

24. The questionnaire was sent to the OAS Member States, and to date, responses were received from: Bolivia; Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Jamaica, Mexico; Panama, Paraguay, United States of America and Uruguay.

25. The questions in the questionnaire were the following: *1) Does your national legislation provide jurisdictional immunities for States and International Organizations? If so, please provide a copy of the relevant code, statute, or other legislative provisions. If not, is there any other relevant guidance on the question of state immunity?; 2) is the determination of immunity a question of law to be decided by your courts or is it determined by your government?; 3) does your national legislation provide an exception for "commercial activities" conducted by the foreign state or entity? For "delicits" or "torts"? For violations of international law?; 4) has your national judiciary rendered significant decisions concerning the immunities of foreign states or governments or their agencies and instrumentalities? If so, please provide the name/date of these decisions and the official citation or a copy of the decisions; 5) has your country signed or ratified the 2005 UN*

Convention on the Jurisdictional Immunities of States and Their Properties? If not, do you expect to sign or ratify the Convention within the next 3 years?; 6) is your country party to any other instruments (treaties, conventions, etc.) that provide for sovereign immunity?; 7) Does your national judiciary enforce common law (international customary law) referring to immunity of States or the immunity of International Organizations?.

26. Firstly, we should point out that the information provided is highly valuable for a work of this kind and also for future studies.

27. Secondly, as the information provided is substantive in view of the number of responses – especially those related to certain regions – they do not allow for general conclusions that may be extrapolated to the rest of the American continent.

28. Without prejudice of item 27 above, the responses received allow for some substantial conclusions that we will succinctly detail below.

29. As regards the prevalence of domestic legislation on immunity of jurisdiction of foreign States, eight States replied that no norms of that kind prevail in their own countries (Panama, Colombia, Bolivia, Brazil, Dominican Republic, El Salvador, Jamaica and Uruguay), while three other States refer that their domestic legislation has norms on the issue, and in one specific case detailed legislation (United States of America, Mexico and Costa Rica).

30. Regarding the organ in charge of the decision related to the applicability of immunity of jurisdiction in a case submitted to decision, this is largely conducted through the judiciary.

31. As regards the scope of immunity of jurisdiction of States, all the responses coincide as to the restricted scope of same in conformity with the activity involved.

32. There is no such definition for "commercial activities"; instead, each situation corresponds to the cases submitted to the judiciary (with the exception of Mexico and Colombia).

33. Relevant verdicts were entered in all the countries replying to the questionnaire, recognizing the immunity of jurisdiction of States within a restricted scope in accordance with the type of activity involved.

34. States replying to the questionnaire were unanimous in that none of them had ratified or adhered to the 2005 United Nations Convention on Jurisdictional Immunities of States and Their Property

35. Finally, as regards the responses to the questionnaire, we must highlight that the judiciary systems enforce customary norms of the International Law on the issue.

XI. INTER-AMERICAN AND UNITED NATIONS CONVENTIONS ON IMMUNITY OF JURISDICTION OF STATES

36. The first statement to be offered refers to the Draft Inter-American Convention on Immunity of Jurisdiction of States (1983) - a legal instrument comprising the work of over a decade of studies and exchanges within the Committee. It is therefore an excellent structured and weighed document.

37. The second statement is that the aforementioned draft is still prevailing, as the principles included in it are still recognized by customary international law.

38. The 2005 United Nations Convention on Jurisdictional Immunities of States and Their Property was drafted more than twenty years after the Draft of the Inter-American Convention, and it includes and incorporates the experiences gathered during that long period of time.

39. It should also be stated that both Conventions, as far as their normative content is concerned, are compatible, although the United Nations Convention is more updated, having been drafted more recently.

40. Finally, it is worth mentioning that both Conventions, especially more recent United Nations one, are consistent with the doctrinary and jurisprudential evolution of contemporary International Law.

XII. CONCLUSIONS

41. In light of the foregoing – and taking into consideration the responses received from the States and additional information collected, we conclude that:

1º) For the purposes of juridical safety and the standardization of common criteria for this issue, it is convenient for States to ratify any of both Conventions, i.e. the regional or the universal, in the understanding that the United Nations Convention is at present more updated than the regional version;

2º) The inexistence of a Convention on the scope of Immunity of Jurisdiction of States does not imply the lack of regulations in the area, but rather that it is normally governed by customary international law;

3º) In terms of Immunity of Jurisdiction of States, when the questions refers to a case being elucidated by the judiciary, it is generally understood that the drafting of a guide of principles in the area is less forceful and valuable than the prevailing customary norm, for which reason it is not completely discarded, but always taking into account the situation to which it should be applied.

Please do not hesitate to contact me should any clarification or additional information becomes necessary.

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9. Protection of cultural heritage assets

Documents

CJI/RES. 233 (XCI-O/17)	Cultural Heritage Assets
CJI/doc.527/17 rev.2	Inter-American Juridical Committee Report. Cultural Heritage Assets

During its XLVI Ordinary Sessions, the General Assembly of the OAS gathered in Santo Domingo, Dominican Republic, in June 2016, instructed the Inter-American Juridical Committee to:

> Study existing legal instruments, in both the inter-American and international systems, pertaining to the protection of cultural heritage assets in order to inform the Permanent Council, prior to the forty-seventh regular session, about the current status of existing regulations in this area to bolster the inter-American legal framework in this area AG/RES. 2886 (XLVI-O/16).

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Dr. Hernández García offered himself to be Rapporteur and the members promptly accepted. In view of the time constraint of the General Assembly's mandate requiring that a report be issued within one year, the Technical Secretariat drafted a report called: "Support document on cultural heritage assets – Universal and Regional instruments and Bilateral examples" (DDI/doc.5/16, August 30, 2016) which will serve to the work of the Rapporteur. Additionally, the Rapporteur presented a preliminary report on the matter, document CJI/doc. 512/16.

He mentioned that many countries in the Hemisphere are parties to the most important instruments worldwide. In this respect, he described the situation using an example of the UNIDROIT Convention (that includes 37 member countries, 11 of which are in the region) regarding stolen or illegally exported cultural heritage assets.

He explained that the common object of conventions on this theme is the definition of property. He proposed drafting a practical guide allowing states to approach the subject from two perspectives: preventive and recovery. He observed that nothing comes from nowhere, as there are some guidelines in the United Nations as well as in the UNESCO (the United Nations Organizations for Education, Science and Culture).

The Chairman congratulated Dr. Hernández for his clarity in the subject covered.

Dr. Salinas joined the Chairman in congratulating the Rapporteur and invited the members to provide their contributions, as time is short for producing the report. He suggested starting a workgroup to help back up the work of the rapporteur.

Dr. Villalta recalled the report on the Protection of cultural assets in situations of armed conflict (CJI/doc.451/14). She said that a report was presented showing ratifications to international treaties related to the subject (CJI/doc. 507/16).

Dr. Mata Prates proposed adopting a methodology including the distribution of the documents by e-means to facilitate interactions and analysis of the theme by other members.

Dr. Hernández García said that he expects to distribute the report before the next Regular Session.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the Rapporteur on the subject, Dr. Hernández, presented his report titled "Cultural Heritage Assets," document CJI/doc.527/17, which was written in response to a OAS General Assembly mandate issued through Resolution AG/RES. 2886 (XLVI-O/16). The first part of the report sets up a classification system of instruments on the subject matter (Treaties on the protection of cultural assets in situations of armed conflict; Protection of cultural, intangible, natural and subaquatic heritage; Protection of archeological property; and, Prohibition of the illicit

export, import and transfer of cultural property). The Rapporteur then reviewed current laws and regulations and recommendations to strengthen the body of law. In view of the global dimensions of illicit trade, because of the wide geographic distribution of potential significant "markets" for cultural property, the report proposes as one input to prepare a User's Guide to the Practical Guidelines, to highlight the regional experience. In all instances, he stressed the significance of international cooperation in this area.

Dr. Baena Soares noted that as the number of legal texts grew, so did the need to bring them into line with actual events on the ground. He asserted that the loss of cultural heritage property had been due to conflicts and also to sales at auction houses, particularly in Europe. He commented that a lot of property has been destroyed despite the existence of conventions to protect it and the support of States.

In reference to the lack of established criteria for the determination of a "good faith purchaser," Dr. Correa suggested that there should also be complementary criteria for a "bad faith purchaser" and that to put a stop to illegal trade it would be necessary to go after their wallets.

Dr. Mata Prates noted that it was likely that all States have laws regarding cultural heritage assets but that, as was mentioned earlier, the problem was global in scope. He said a mechanism is needed so property could be recovered after it has been illegally stolen from the country. Because of the implications on domestic law, the judicial branch should become involved in order to more readily enforce international norms. As to item 4 of the report's conclusions, he supported drafting a User Guide to strengthen domestic legislation. But, he respectfully noted that this would not solve a problem that required an international solution and he suggested recommending ratification and implementation of one or two instruments, perhaps specifically ones with a regional scope.

Dr. Villalta thanked those in attendance and noted that the report had essentially completed fulfillment of the mandate. She asked, nonetheless, whether the Rapporteur would consider also completing the User's Guide so that the report could be presented as fully completed.

Dr. Cevallos thought that the report contained sound legal background; international cooperation was essential to improve the situation; and that this is a point that the Committee should drive home in the report. He also mentioned enforcing the law and that, without a legal basis, courts would not be keen to do so. Lastly, he expressed interest in an instrument with teeth that would inform the General Assembly about the need to raise collective awareness.

Dr. Hollis acknowledged that the report represented an analysis of a wide range of tools, inasmuch as it would encompass 19 treaties and 49 instruments. As to non-compliance, he noted that this issue was not limited to this topic alone. In relation to the proposed User Guide, he asked who the intended audience would be. Although all States have an interest in the matter, he pointed out that there was a small group of "market States" of importance in terms of non-compliance, which fueled trade in cultural property. He wondered, if the guide was intended for all market States, how this challenge could be navigated.

Dr. Moreno expressed similar concerns to those of Dr. Mata Prates. He felt the emphasis should be on asset recovery. However, as only 11 States had ratified the UNIDROIT instrument and many more are parties to the UNESCO instrument, he wondered what position the Committee should take on this situation.

The Chairman concurred with the comments made and that the report fully honored the request of the General Assembly. He said that it provided a general overview and the current status of the instruments in order to strengthen the Inter-American system, which was the most relevant aspect. He shared the view that this was a global issue, with emphasis on illegal trade of these assets and that this required international cooperation. He noted that international cooperation flowed from international treaties in force and as was demonstrated, with the exception of the UNESCO instrument, these have not been widely ratified. He further noted that the biggest shortcoming of the UNESCO instrument was to not offer protection to non-registered artifacts. He then turned to the San Salvador instrument and pointed out that, although it specifically covered illegally traded artifacts, the paradox was that this instrument had not been widely ratified. In his

view, the political entities should consider what would be required to promote ratification of this convention and to strengthen it at the regional level. He acknowledged that international cooperation could only occur on the basis of international instruments. However, he shared the view of the importance of ratification of international and Inter-American instruments. He thought that a guide was required to strengthen implementation thereof, taking into account existing norms, and the importance of promoting ratification of the San Salvador Convention.

As to the issue of implementation of existing norms, he replied that where obligations are required of *both* parties, this would require involvement of the executive branch and in such circumstances, it is usual for parties to resort to the courts. Although there are international norms, domestic law makes it more feasible to comply with international law. In some cases, regardless of what the international community has achieved, we "hit a wall" in the domestic arena. This is based on the experience of Ecuador and Mexico. He noted that the cost of resorting to European Courts to recover artifacts is high and this is not due to a lack of will or executive power. Governments wish to cooperate, but where there is a separation of powers, this is particularly difficult. Neither the OAS nor UNESCO would be able to change this fact of life. In this context, then, the question is how can the Committee best contribute? He then offered the following suggestions:

1. Universalize the international rules. The starting point would be to call upon States to consider the existing instruments of the UNESCO and the OAS. This would be a signal to the international community.
2. International cooperation translates into the will of States. The Committee will not move forward in the drafting the User Guide until it receives the opinion of the political body, which could view it as unnecessary as an instrument to strengthen the legal framework. Besides, in practical terms, the drafting of a document of that nature could not be completed before the deadline set by the General Assembly (June 2017).
3. In response to the question raised by Dr. Hollis as to the intended end user, the Rapporteur explained that the Guide would be targeted to the officials who enforce these instruments. In many countries, this would be the judiciary. The Guide would not be binding, but would a useful to interpretation and would aid in putting into practice and highlighting the regional practices that worked well in other States.
4. In response to Dr. Correa's question regarding the criteria for a good faith purchaser, he noted that the holder of stolen cultural property would have the right to be paid, if that person did not know that the property had been stolen and acted in good faith. Due diligence would be necessary to take into account the quality of the piece, the price paid, the records, and the burden of proof would rest on the good faith holder. The burden of proof with respect to restitution would rest on the victim.
5. Consider the elements that would make restitution easier. Mexico would have to amend its legislation to be able to recover property. Thus, one can see a vicious cycle of 'the more players involved, the better.' If the market States have nothing to offer, then no progress can be made. Hence, the significance of the political appeal to ratify the instrument.

Based on comments by the Committee members, Dr. Hernández revised the report in order to reflect, among other ones, the following elements: reference to "other continents" in the report's conclusions; the call to ratify the relevant instruments was made more broadly; a request was added for the States to ratify the San Salvador Convention and to encourage States to adopt legislation and cooperate. Lastly, a recommendation on drafting a User Guide was also added.

The Rapporteur expressed interest in highlighting Inter-American instruments without delving deeply into the reasons for the low number of ratifications of the San Salvador Convention. He thought that this exercise would open the door so States would show their commitment.

The resolution attached to the report was approved unanimously, and the decision was made that both documents would be forwarded to the Permanent Council.

The resolution and the report of the Inter-American Juridical Committee are included below.

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CJI/RES. 233 (XCI-O/17)

CULTURAL HERITAGE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO CONSIDERATION the mandate of the General Assembly contained in Resolution AG/RES. 2886 (XLVI-O/16) of the year 2016, through which the Committee is asked "to analyze the current legal instruments related to the protection of cultural heritage , both in the inter-American and international systems," so that before the 47th Regular Session of the aforementioned Assembly the Permanent Council is made aware of the current state of legislation on the issue, with the aim of making the inter-American juridical system more robust in the matter;

BEARING IN MIND document CJI/doc.527/17 rev.1, "Cultural Heritage", presented by the rapporteur of the topic, Dr. Joel Hernández García, and after analyzing and discussing the aforementioned document during the current Regular Session;

TAKING INTO CONSIDERATION working document DDI/doc.5/16 "Support Document on Cultural Heritage – Universal and Regional Instruments and Bilateral Examples", drafted by the Department of International Law;

RECOGNIZING that the protection of cultural heritage has global dimensions, given that illicit trade of such materials also occurs between continents, and recognizing also the relevance that such protection represents, particularly for the countries in our Hemisphere,

RESOLVES:

1. To approve the report on "Cultural Heritage", document CJI/doc.527/17 rev. 2, which is attached to this Resolution, and forward it to the Permanent Council for consideration.

2. To urge the Member States that have still not ratified or adhered to the various treaties on the matter to do so, especially the 1976 Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (San Salvador Convention).

3. To encourage Member States to establish proper international cooperation mechanisms to assist in the effective implementation of the obligations that derive from those treaties.

4. To encourage Member States to strengthen their domestic legislation according to the standards established in the treaties in the field.

5. Encourage Member States to take into consideration the 2015 Practical Guidelines approved by the UNESCO for the implementation of the Convention for the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.

6. Recommend Member States to draft a Practical Guide for Users of the Practical Guidelines approved by the UNESCO with the aim of underlining regional experience besides proposing mechanisms of regional cooperation.

This Resolution was unanimously approved at the session held on 9 March, 2017, by the following members: Doctors Alix Richard, Joel Antonio Hernández García, Ruth Stella Correa Palacio, João Clemente Baena Soares, José Antonio Moreno Rodríguez, Hernán Salinas Burgos, Duncan B. Hollis, Juan Cevallos Alcívar, Ana Elizabeth Villalta Vizcarra and Carlos Mata Prates.

* * *

CJI/doc.527/17 rev. 2

INTER-AMERICAN JURIDICAL COMMITTEE REPORT:

CULTURAL HERITAGE ASSETS

INTRODUCTION

The OAS General Assembly, in resolution AG/RES. 2886 (XLVI-O/16) titled International Law, approved on June 14, 2016, gave the following mandate to the Committee:

> To instruct the Inter-American Juridical Committee to study existing legal instruments, in both the inter-American and international systems, pertaining to the protection of cultural heritage assets in order to inform the Permanent Council, prior to the forty-seventh regular session, about the current status of existing regulations in this area to bolster the inter-American legal framework in this area. AG/RES. 2886 (XLVI-O/16).

The Department of International Law on its role of technical secretariat of the Committee (the Secretariat) has completed an extensive study of the relevant instruments on the subject, both global and regional (document DDI/doc.5/16 of August 30, 2016). In addition, Dr. Elizabeth Villalta presented a document with the status of ratification of the pertinent conventions (document CJI/doc.507/16 of September 26, 2016).

To address the General Assembly's request, this document deals with the following aspects:

1. ANALYSISOF LEGAL INSTRUMENTS ON PROTECTION OF CULTURAL HERITAGE ASSETS AT THE GLOBAL AND AMERICAN LEVELS

The document prepared by the Secretariat includes all binding and non-binding instruments on the subject. It shows the existence of 18 multilateral treaties prepared under the auspices of UNESCO, UNIDROIT, the OAS, and the Council of Europe. In addition there are 49 recommendation instruments and resolutions adopted by international organizations such as the UN, the OAS, the European Union, and the African Union.

As the Secretariat's document indicates, the conventions, declarations, and recommendations on this subject have multiplied in recent years, and their coverage has expanded substantially. Initially, they were limited to heritage property, and over time they have been expanded to include intangible assets, such as ancestral practices, literature, or the culinary tradition of regions, peoples, and countries.

Definition of "cultural heritage assets"

At the outset of this study we must define the term that will orient the analysis. Naturally, the matter varies from one instrument to another, although in general tangible and intangible assets are fully covered in the documents.

A first definition to be considered is that of "cultural heritage," adopted at the World Conference on Cultural Practices of UNESCO, held in Mexico in 1982. Paragraph 23 of the Mexico City Declaration states:

The cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries.

With a territorial approach, the Convention of San Salvador of 1976 stipulates in Article 5 that "The cultural heritage of each state consists of the property…found or created in its territory and legally acquired items of foreign origin."

The "heritage" designation is assigned by each state based on its national legislation. The various instruments establish the prerogative of the States parties to identify cultural heritage in their domestic legislation and the mechanism for communicating their inventories to the other parties.

For example, most countries in the Hemisphere define these assets as inalienable and imprescriptible property of the state with respect to certain cultural assets. This authority is recognized and codified in Article 13, paragraph d) of the UNESCO Convention of 1970, in the understanding that the inalienable quality does not depend on having previously exercised physical control of them, so it includes those not yet discovered, those discovered illegally in clandestine excavations, and those not officially catalogued.

Classification of the multilateral treaties:

To understand the subject matter of existing multilateral treaties, they could be classified in four groups. Here is a summary of the most relevant instruments in each of them.

a. Treaties on protection of cultural assets in cases of armed conflict

The need to protect cultural assets arose from the devastating effects of armed conflicts on these assets. In other words, protection is part of the law of war so that hostilities do not destroy protected cultural assets. As a result of World War I, and in an effort to develop the principles of the Hague Conventions of 1899 and 1907, the Pan American Union adopted the **Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact),** in Washington D.C. on April 15, 1935. It was signed by 21 members of the Union of which 10 submitted their corresponding instrument of ratification. In accordance with Article 1 of the Pact, "The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents." The Pact also grants protection to personnel of these institutions in time of peace as well as in war.

To identify the protected cultural assets, the Pact provided for a distinctive flag (red circle with a triple red sphere in the circle on a white background) in accordance with the model attached to the Treaty.

The Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed in The Hague on May 14, 1954is the first international treaty of universal scope dealing exclusively with the protection of cultural property in the event of armed conflict. The purpose of this instrument is to protect cultural property as defined in the Convention in two ways: (i) safeguarding and (ii) respect for that property.

With respect to the former, the parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate. With respect to the latter, the parties undertake to respect cultural property situated within their own territory as well as within the territory of other parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict, and by refraining from any act of hostility directed against such property.

Currently 22 OAS Member States are parties to this Convention. The 1954 Protocol has been ratified by 19 States in the Hemisphere and the second Protocol of 1999 has been ratified by 18 states in the Hemisphere.

b. Protection of intangible, natural, and underwater cultural heritage

UNESCO has adopted extensive regulations for the protection of various types of cultural heritage. These are the most important:

The **Convention concerning the Protection of World Cultural and Natural Heritage**, signed in Paris on November 16, 1972, seeks to prevent the deterioration or disappearance of cultural and natural heritage in view of the extent and seriousness of the threats to it. Thirty-five OAS Member States are parties to this Convention.

The **Convention on the Protection of the Underwater Cultural Heritage,** signed in Paris on November 3, 2001, is intended to protect and preserve the underwater cultural heritage as an integral part of world cultural heritage, which is threatened by unauthorized activities. Currently 18 Hemisphere states are parties to this Convention.

The **Convention for the Safeguarding of the Intangible Cultural Heritage,** signed in Paris on October 17, 2003, establishes measures to guarantee the viability of intangible cultural heritage as defined in the Convention. These measures include the identification, documentation,

research, preservation, protection, promotion, enhancement, transmission, and revitalization of the various aspects of such heritage. Thirty-one Hemisphere states are parties to this Convention.

The **Convention on the Protection and Promotion of the Diversity of Cultural Expressions,** signed in Paris on October 20, 2005, seeks to preserve cultural diversity by including culture as a strategic element in national and international development policies, and in international cooperation for development. Thirty-three OAS Member States are parties to this Convention.

c. Protection of archeological property

In the context of the Council of Europe, the **European Convention on the Protection of the Archaeological Heritage** was adopted in London on May 6, 1969, and revised by the Convention adopted in La Valetta on January 16, 1992. The Convention seeks to establish specific measures for the protection of archeological property, as defined in the instrument.

According to the practice of the Council of Europe, the Convention is open to accession by states that are not members of the Council by invitation of the Commission of Ministers. To date, no state in the Americas has expressed interest in acceding to the treaty, probably because the OAS has adopted a broader instrument on the subject, which will be discussed below.

d. Prohibition of export, import, and illicit transfer of cultural property

OAS Member States have special interest in the topic of prohibition of the exportation and importation of cultural property. In this regard international cooperation is required more than in other cases to carry out the restitution of property that has been illicitly removed from a territory. Three international organizations have sponsored conventions on this subject: UNESCO, the OAS, and the International Institute for the Unification of Private Law (UNIDROIT). The international organizations have developed regulations to facilitate compliance with these conventions.

The **Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,** signed in Paris on November 14, 1970, seeks to protect cultural property from theft, clandestine excavations, and illicit exports. Twenty-six Hemisphere states are parties to this Convention, including two countries with a relevant "market" for cultural property.

The **Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador),** approved in Santiago, Chile, on June 16, 1976, was specifically established to deal with "the continuous looting and plundering of the native cultural heritage suffered by the countries of the hemisphere, particularly the Latin American countries." To address this problem, the Convention of San Salvador contains provisions on: (i) the legal ownership regime; (ii) the obligation to identify, register, protect, and safeguard the cultural heritage of the parties; (iii) the obligation to take measures to prevent and curb the unlawful export, import, and removal of cultural property; and (iv) the obligation to take measures for the return of such property to the state to which it belongs in the event of its removal.

Twelve OAS Member States are parties to this Convention, but no country that is a relevant "market" for cultural property.

The **UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,** signed in Rome on June 24, 1995, applies to claims of an international character for the restitution of stolen cultural objects and the return of cultural objects exported illegally. Only 11 Hemisphere states are parties, none of them a relevant "market" for cultural property.

2. CURRENT STATUS OF THE RULES IN FORCE

The analysis accomplished reveals a substantial number of international instruments, many of which have received limited ratifications. From the review so far we can conclude:

2.1 There is a broad gamut of binding and soft-law instruments developed by international organizations. These instruments provide extensive coverage of aspects related to the protection, conservation, safeguarding, and restitution of cultural property.

2.2 The status of ratification of the binding instruments varies, but is generally low. A major concern is that few countries with a relevant "market" for cultural assets are parties to the principal instruments.

2.3 The prevention of the export, import, and illegal transfer of cultural heritage remains the region's main concern. Recovery and restitution of illegally exported property demands greater cooperation by the states.

2.4 The Convention of San Salvador of 1976 is the only instrument adopted in the framework of the OAS. However, only 12 Member States are parties to it and none of them is a relevant "market" for cultural property.

2.5 However, most OAS Member States are parties to the UNESCO Convention of 1970, and 26 Hemisphere nations have ratified it. This Convention has a total of 131 states parties, with a significant number of countries with a relevant "market."

2.6 Nearly all the states of the region (Argentina, Bolivia, Chile, Colombia, Ecuador, Guatemala, Mexico, Peru, etc.) have strong legal frameworks for the protection of cultural heritage property. Many of them have exercised their sovereign authority to declare ownership of whole categories of certain assets. Therefore, it does not appear necessary to prepare a model law to strengthen domestic legislation.

2.7 In principle, this Rapporteur considers that a new inter-American convention would not contribute to solving the problems of protection of cultural property, fighting illegal trafficking in it, and restitution, given the extensive regulations already in place.

2.8 Since the problem of illicit transfer of cultural property is worldwide, it must be addressed globally in order to seek broader cooperation from more countries with a relevant "market."

3. RECOMMENDATIONS TO BOLSTER THE INTER-AMERICAN LEGAL FRAMEWORK

The countries of the region face two problems with respect to protection of their cultural property. Firstly, to prevent the illicit traffic in this property, and secondly, to recover these assets when they have been removed illegally.

The states also have the challenge of enacting appropriate domestic legislation to support their claims, and having facilities for effective implementation of international regulations.

As for the first aspect, domestic legislation that gives the state ownership of a category of cultural assets should be the first line of defense against their theft. The laws should prevent the laundering and international trade of such assets when their origin is uncertain (e.g., when it is impossible to determine when they were "exported" from the country of origin or how long they have been offered in the antiquities and art market).

With respect to the effective application of international regulations, this Rapporteur considers that the American states should continue working with the most advanced initiatives for protection of cultural property to strengthen existing systems and avoid duplication of effort. Because of the high number of ratifications and broad scope of the UNESCO Convention of 1970, itis the most relevant document on the subject.

From the practical standpoint, it is significant that the UNESCO Convention of1970 covers the prevention of illicit traffic in cultural property and the restitution phase. Specifically, according to Article 7, the parties undertake to take appropriate steps, at the request of state of origin, to recover and return cultural property after the entry into force of the Convention.

However, there are limitations in the Convention of 1970. UNESCO has been considering ways to improve the restitution of cultural assets, especially paleontological property and archeological artifacts.

In the first place, the Convention (Article 7) only covers cultural property stolen from a museum or a religious or secular public monument or similar institution, provided that such property is documented as appertaining to the inventory of that institution. This means that paleontological property, archeological artifacts, and other things from clandestine excavations are not covered by the Convention.

In the second place, the Convention (Article 7) requires that when cultural property is returned the requesting state pay just compensation to an innocent purchaser or to a person who has valid title to that property. The Convention did not include any criteria for determining when a

purchaser has acted in good faith. In this regard the Convention of 1970, like other instruments, has been a challenge to implement.

In 2012, the Second Meeting of States Parties to the 1970Conventiondecided to form a Subsidiary Committee composed of 18 states (as of May 2015: Bulgaria, Chad, China, Croatia, Ecuador, Egypt, Italy, Greece, Japan, Madagascar, Morocco, Mexico, Nigeria, Oman, Pakistan, Peru, Rumania, and Turkey) to—among other tasks—prepare guidelines contributing to the implementation of the Convention.

Through its chairperson, the Committee began a process to submit draft guidelines for approval of the Meeting of States Parties to the Convention. Thanks to the commitment of the Member States, after a period of continuous and intensive work, the Subsidiary Committee completed Draft Operational Guidelines for the 1970 Convention in just one year.

The Draft Operational Guidelines, diligently prepared by the Subsidiary Committee, were approved by consensus during the first day of the Third Meeting of States Parties to the 1970 Convention (May 18-20, 2015, Paris).

The abovementioned limits have many interrelated substantive ramifications, and in this context the Operational Guidelines are a very useful instrument for strengthening the protection of cultural property, dealing with questions concerning recovery and restitution of cultural property improperly removed from the country of origin, and confronting the trafficking in cultural property and clandestine excavations, while considering and developing the following topics, among others of great importance:

i. The impossibility of adopting exhaustive security measures at paleontological and archeological sites;

ii. The importance of certain cultural property that has not been previously inscribed in the respective state registry;

iii. Problems in the concept of exhaustive or extensive inventories of protected cultural property for purposes of its restitution and recovery;

iv. International cooperation and agreements through diplomatic channels regarding cultural property resulting from clandestine excavations;

v. International recognition of laws that give a state ownership of a category of cultural property;

vi. Lack of established criteria to determine the good faith of purchasers of cultural property with parameters that afford a certain degree of objectivity and verification; and

vii. Cause and effect relationship between the demand and traffic in cultural property, and the negative repercussions of the latter.

To strengthen the capacity of the Hemisphere states, a "User's Guide"could be developed for application of international instruments on the subject (both Conventions and soft law).

A User's Guide would have the following objectives:

- Call the states' attention to the relevance of and need to take into consideration the existing instruments when designing and executing their respective policies and strategies, both domestic and international (including the matter of restitution and recovery).
- Highlight good regional practices.
- Propose mechanisms for regional cooperation and close coordination of states in pertinent international forums for promoting and sustaining Hemispheric initiatives.

The purpose of an instrument of this type would be to bring to the Hemisphere states' attention the relevance and desirability of taking into account and applying the Operational Guidelines when designing their respective domestic and international policies and strategies in the cultural area, and when evaluating their legal frameworks and developing new legislation.

In addition, a User's Guide to the Operational Guidelines would highlight good regional practices for protection, recovery, and restitution of protected cultural property and give states a frame of reference for proposing regional cooperation mechanisms, and for closer coordination of

the states in applicable international forums in order to promote and sustain Hemispheric initiatives.

The circumstances and challenges faced by the OAS Member States in the area of protection of cultural assets, fighting the trafficking in cultural property, and recovering of heritage assets transcend the Hemisphere boundaries and require a global approach.

Therefore, a User's Guide to the Operational Guidelines would also contribute to encourage and strengthen inter-regional cooperation to afford protection to cultural property, attack trafficking, and facilitate restitution to states of origin.

4. CONCLUSIONS

4.1 The preceding analysis shows clearly the existence of international instruments that cover the most complex aspects of protection of cultural property.

4.2 The protection of cultural property has global dimensions because of the wide geographical distribution of possible relevant "markets" for it, especially when it has been transferred illegally to other continents.

4.3 The first step should be to ensure that the legally binding instruments have all been ratified. The international community should go on appealing for the pertinent treaties to be ratified.

4.4 In order to strengthen the inter-American legal system, the Member States of the OAS should ratify the **Convention on Defense of Archeological, Historical and Artistic Heritage of the American States (Convention of San Salvador).**

4.5 Furthermore, the American States should adopt legislation in keeping with the standards set down in the treaties that allow them to protect their cultural heritage and, if necessary, cooperate with other States in recovering any illegally transferred cultural assets.

4.6 Work undertaken by the leading specialized organizations, notably UNESCO, should be continued. This organization has been responsible for making the most relevant legal efforts to prohibit illegal transferring of cultural assets; more recently, UNESCO adopted the Practical Guidelines for application of the Convention of 1970.

4.7 The region could contribute by drafting a Practical Guidelines for Users for the purpose of showing regional experience in the matter, besides proposing mechanisms of regional cooperation. This Guide also could be used to orientate national entities in making their national legislation more robust.

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TABLE OF MEMBER STATES OF THE OAS THAT ARE PART OF TREATIES
RELATING TO THE PROTECTION OF CULTURAL PROPERTY ASSETS

	Inter- American		**UNESCO**								**UNIDROIT**
País	Roeri	San Salvador Convention 1976	The Hague Convention 1954	Protocol 1 of the Hague Convention 1954	Protocol 2 of The Hague Convention 1999	Cultural Property 1970	World heritage	Underwater Cultural Heritage	Intangible Cultural Heritage	Cultural Diversity 2005	Stolen or illegally exported cultural objects1995
Antigua & Barbuda							01/11/1983	25/04/2013	25/04/2013	25/04/2013	
Argentina		27/05/2002	22/03/1989	10/05/2007	07/01/2002	11/01/1973	23/08/1978	19/07/2010	09/08/2006	07/05/2008	03/08/2001
Bahamas						09/10/1997	15/05/2014		15/05/2014	29/12/2014	
Barbados			09/04/2002	02/10/2008	02/10/2008	10/04/2002	09/04/2002	02/10/2008	02/10/2008	02/10/2008	
Belize						26/01/1990	06/11/1990		04/12/2007	24/03/2015	
Bolivia		17/01/2003	17/11/2004			04/10/1976	04/10/1976		28/02/2006	04/08/2006	13/04/1999
Brazil	05/08 /1936		12/09/1958	12/09/1958	23/09/2005	16/02/1973	01/09/1977		01/03/2006	16/01/2007	23/03/1999
Canada			11/12/1998	29/11/2005	29/11/2005	28/03/1978	23/07/1976			28/11/2005	
Chile	08/09 /1936		11/09/2008	11/09/2008	11/09/2008	18/04/2014	20/02/1980		10/12/2008	13/03/2007	
Colombia	20/02 /1937		18/06/1998	18/06/1998	24/11/2010	24/05/1988	24/05/1983		19/03/2008	19/03/2013	14/06/2012
Costa Rica	15/04 /1935	14/05/1980	03/06/1998	03/06/1998	09/12/2003	06/03/1996	23/08/1977		23/02/2007	15/03/2011	
Cuba	26/08 /1935		26/11/1957	26/11/1957		30/01/1980	24/03/1981	26/05/2008	29/05/2007	29/05/2007	
Dominica							04/04/1995		05/09/2005	07/08/2015	
Ecuador		31/08/1978	02/10/1956	08/02/1961	02/08/2004	24/03/1971	16/06/1975	01/12/2006	13/02/2008	08/11/2006	26/11/1997
El Salvador	05/01 /36	27/06/1980	19/07/2001	27/03/2002	27/03/2002	20/02/1978	08/10/1991		13/09/2012	02/07/2013	16/07/1999
United State	07/13 /35		13/03/2009			02/09/1983	07/12/1973				
Grenada						10/09/1992	13/08/1998	15/01/2009	15/01/2009	15/01/2009	
Guatemala	09/16 /36	24/10/1979	02/10/1985	19/05/1994	04/02/2005	14/01/1985	16/01/1979	03/11/2015	25/10/2006	25/10/2006	03/09/2003
Guyana							20/06/1977	28/04/2014		14/12/2009	
Haiti		28/10/1983				08/02/2010	18/01/1980	09/11/2009	17/09/2009	08/02/2010	
Honduras	10/02 /36	15/04/1983	25/10/2002	25/10/2002	26/01/2003	19/03/1979	08/06/1979	23/07/2010	24/07/2006	31/08/2010	08/05/1998
Jamaica							14/06/1983	09/08/2011	27/09/2010	04/05/2007	
Mexico			07/05/1956	07/05/1956	07/10/2003	04/10/1972	23/02/1984	05/07/2006	14/12/2005	05/07/2006	
Nicaragua		06/02/1980	25/11/1959	25/11/1959	01/06/2001	19/04/1977	17/12/1979		14/02/2006	05/03/2009	

Panamá		10/05/1978	17/07/1962	08/03/2001	08/03/2001	13/08/1973	03/03/1978	20/05/2003	20/08/2004	22/01/2007	26/06/2009
Paraguay		20/06/1906	09/11/2004	09/11/2004	09/11/2004	09/11/2004	27/04/1988	07/09/2006	14/09/2006	30/10/2007	27/05/1997
Peru		28/11/1979	21/07/1989	21/07/1989	24/05/2005	24/10/1979	24/02/1982		23/09/2005	16/10/2006	05/03/1998
Dominican Republic	11/02/36		05/01/1960	21/03/2002	03/03/2009	07/03/1973	12/02/1985		02/10/2006	24/09/2009	
Saint Kitts and Nevis							10/07/1986	03/12/2009	15/04/2016	26/04/2016	
Saint Lucia							14/10/1991	01/02/2007	01/02/2007	01/02/2007	
Suriname							23/10/1997				
Saint Vincent and the Grenadines							03/02/2003	08/11/2010	25/09/2009	25/09/2009	
Trinidad and Tobago							16/02/2005	27/07/2010	22/07/2010	26/07/2010	
Uruguay			24/09/1999	24/09/1999	03/01/2007	09/08/1977	09/03/1989		18/01/2007	18/01/2007	
Venezuela (Bolivarian Republic of)	11/11/36		09/05/2005			21/03/2005	30/10/1990		12/04/2007	28/05/2013	

10. Conscious and effective regulation of business in the area of human rights

Documents

CJI/RES. 232 (XCI-O/17)	Conscious and effective regulation of business in the area of human rights.
Attached: CJI/doc.522/17 rev.2	Report of the Inter-American Juridical Committee on conscious and effective regulation of business in the area of human rights

During its XLVI Ordinary Sessions, the General Assembly of the OAS gathered in Santo Domingo, Dominican Republic, in June 2016 adopted a mandate in the area of human rights and business. In this regard, the resolution calls on the Inter-American Juridical Committee to make a:

> Compilation of good practices, and initiatives, legislation, jurisprudence and challenges to be used in identifying alternatives for approaching the subject, to be considered by the Permanent Council within one year; in addition, request the Organs of the Inter-American System of Human Rights to provide their input and expertise to the process (document AG/RES. 2887 (XLVI-O/16)).

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), the plenary chose Dr. Villalta as Rapporteur of the topic, and she pledged to provide a report within the allotted timeframe in order to submit it to the consideration of the Permanent Council.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the Rapporteur on the subject, Dr. Villalta, presented the document "Conscious and effective regulation of business in the area of human rights," document CJI/doc.522/17, in response to the mandate of the General Assembly, Resolution AG/RES. 2887 (XLVI-O/16). On this occasion, the Rapporteur described the seven major components of her analysis: (a) global initiatives, (b) regional initiatives, (c) domestic legislation, (d) case law in the Inter-American human rights system, (e) best practices (noting that the concept of corporate social responsibility has been added to the corporate codes of conduct of businesses), (f) challenges in addressing this issue and then offered (g) several alternatives. The recommendations of the report include proposals to: coordinate global and regional efforts to support the development of a binding legal instrument; appointment by the OAS of a Special Representative on Business and Human Rights; encourage OAS Member States to include Corporate Social Responsibility provisions in their domestic legal framework and disseminate international standards on business and human rights; and, request an advisory opinion from the Inter-American Court of Human Rights, among other ones.

Dr. Mata Prates expressed his appreciation for the report and asked the Rapporteur about the use of the term "responsibility" and whether there existed only one social responsibility. If the concept is defined in terms of who commits the act, this could create a complex scenario because if there was to be one set (of responsibility) for the corporation, then there would have to be another one for the state and so forth, and this could result in a kind of fragmentation. He concluded by saying that, in his view, the report presented by the Rapporteur allows the Committee to fulfill its mandate.

Dr. Hollis offered some comments followed by questions. First, he requested clarification about the adoption of the UN Resolution cited in the report on the preparation of a legally binding instrument (A/HRC/RES/26/9), which had not been unanimously approved, as the United States of America had voted against it. As for US domestic laws, he asked for clarification of the recent US Supreme Court decision that had ruled that the "Foreign Corrupt Practices Act" would not have extraterritorial application on the topic under consideration. He asked for an explanation of the use and meaning of language that sounded like 'mandatory' to his ear, and said that although he personally agreed with the articles, he questioned whether such statements were intended as a matter of international law or domestic law. Lastly, he agreed that it would be in the interest of the community to have a binding

legal instrument on the subject, but questioned whether such a recommendation would fall under the mandate given to the Committee.

Dr. Correa thought that this topic provided an important source of human rights protection. In this regard, she urged writing into the report the decisions of the Commission and the Court that have recognized State responsibility for violations of human rights, stemming from acts of individuals in particular situations. She noted that investment instruments should include human rights and collective rights protections, such as the right to a healthy environment. This could help to prevent situations where States continue paying off the debt of the abuses of multinational companies. Similarly, whenever a trade agreement includes a chapter on investment, it should include clauses aimed at providing minimum standards to protect human rights not only in labor issues but also relating to collective rights.

Dr. Moreno suggested that where the report contained references to public order, this should be supported with illustrative examples. In that regard, he mentioned work that has been undertaken by him in partnership with Dr. Villalta concerning the law applicable to international contracts, which could be relevant to concepts concerning responsibility.

Dr. Hernández agreed with Dr. Mata Prates that the report fulfilled the mandate entrusted to the Committee. In his view, the Committee should consider alternatives that would fall under the Inter-American framework and this should be the focus. He noted that Dr. Novak had already prepared a report on the topic that had been proposed by the Committee and suggested that this should be the first recommendation, not as an alternative, but as a direct action of the Committee.

Secondly, he noted that the Court, as part of the Inter-American system, has authority to hand down decisions. Accordingly, the Court could help to establish general principles that would go a bit further.

Dr. Baena Soares said it was important to be clear with regard to the alternatives, inasmuch as they do not all go to the same point in the hierarchy; while some would be considered “necessary” and others “convenient.” He thought that Drs. Mata, Moreno and Hernández had raised important points and presented an ideal that would be difficult to attain.

Dr. Salinas invited members to look at the contribution that should be made by the Committee. He also agreed that there would have to be a hierarchy of the instruments presented, as some were more relevant than others, all of which would need to be clearly demonstrated. He reflected that it might be helpful to identify for the General Assembly those human rights under consideration and to explain that some rights are more relevant and urgent than others with respect to “corporate social responsibility."

Dr. Villalta responded to the comments by expressing her gratitude. In response to Dr. Hollis’s comments, she explained that in her review of all UN documents in relation to the Ruggie Framework, only the binding instrument had not been agreed upon unanimously. With regard to free trade agreements, it would be important to include discussion of business and human rights, as had been proposed by Dr. Correa. She suggested as well that the Committee ask the Inter-American Court and Commission on Human Rights whether they have been working in this area. As to the Court, she proposed that it issue an advisory opinion, as was issued in 2003 in relation to migrant workers.

Dr. Correa referred to paragraph 3 of the mandate given by the General Assembly and suggested that it might not be necessary for the Committee to make such a request because the mandate already sets this forth and it would be for the Court to respond. Therefore, the Committee’s report should be written “based on a advisory opinion issued by the Court.”

Dr. Mata Prates suggested adding to the proposed guide that is being drafted by Drs. Villalta and Moreno a reference to this issue, considering that it might be of interest to the General Assembly. In response, the Chairman explained that the guide in matters of contracts is undertaken at the Committee’s own initiative and not entrusted by the General Assembly.

In light of the comments offered, Dr. Villalta submitted a revised version of her report taking into consideration the following items:

- Dr. Hollis's suggestion in reference to the UN resolution because although the Ruggie Principles themselves had been unanimously approved, the legal instrument had not.
- Corrections to the summary of the US law to say that the statute applies only to human rights abuses "… committed in the United States."
- Simplification of the recommendation to support adoption of existing instruments.
- Dr. Hernández's proposal to place greater emphasis on the Guiding Principles on Corporate Social Responsibility, which were prepared by Dr. Novak and ratified by the Committee; these Principles have been included herein as part of the Annex.
- Mention of Inter-American human rights system and its contribution in particular to an opinion regarding the responsibilities of States.
- Dr. Correa's comments on the last paragraph pertaining to free trade agreements in general as well as investment agreements or chapters in particular, which are intended to set minimum standards of human rights protection.

In response to the Chairman's comments, Dr. Villalta noted that the Ruggie Principles have been categorized into three groups. This categorization had been done previously by the Department of International Law as it created the collection of all the instruments. She referred to page 14 as where the hierarchy with respect to companies and specific human rights is found in the report.

Additionally, the Rapporteur explained that the resolution would become a critical annex to the report on the topic that would be submitted to the OAS General Assembly. In response to the question posed by Dr. Mata Prates about the meaning of "initiatives" in the first paragraph, Dr. Villalta replied that the wording had been taken verbatim from the mandate. Dr. Mata Prates asked whether it was usual to include the last paragraph that the Committee "remains at the disposal of the political bodies …" to which Dr. Dante Negro replied that this was simply an alert that the Committee was open to further discussion.

The resolution accompanying the draft report was unanimously approved and it was decided that both documents would be submitted to the Permanent Council.

The resolution and the report of the Inter-American Juridical Committee are included below.

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CJI/RES. 232 (XCI-O/17)

CONSCIOUS AND EFFECTIVE REGULATIONS FOR COMPANIES IN THE SPHERE OF HUMAN RIGHTS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the mandate of the General Assembly in its resolution AG/RES. 2887 (XLVI-O/16) of 2016, requests that the Committee carry out a recompilation of good practices, initiatives, legislation, jurisprudence and challenges to be used as groundwork to identify alternative ways to address the theme "conscious and effective regulations for companies in the sphere of human rights", which will be sent to the Permanent Council for their appreciation within a year;

BEARING IN MIND the document CJI/doc.522/17 rev.1 "Conscious and Effective Regulations for Companies in the Sphere of Human Rights", presented by Doctor Ana Elizabeth

Villalta Vizcarra, Rapporteur of the theme, and having analyzed and discussed said document during the present regular session;

RECOGNIZING that the Rapporteur's report includes a list of recommended alternatives, that the Permanent Council may take into account, either collectively or with respect to those individual recommendations they deem most likely to advance the conscious and effective regulation of business in the sphere of human rights;

FURTHERMORE, the working document DDI/doc.01/17 "Recompilation of Good Practices, Initiatives, Legislation, Jurisprudence and Challenges to Identify Alternative Ways to Address the Social Responsibility of Companies in the Continent", drafted by the Department of International Law and annexed to this resolution;

RECALLING that in 2014 this Committee approved, through Resolution CJI/RES. 205 (LXXXIV-O/14) a "Guide of Principles on Social Responsibility of Companies in the Field of Human Rights and the Environment in the Americas", which was appreciated by the General Assembly of the OAS,

RESOLVES:

1. To approve the report "Conscious and Effective Regulations for Companies in the Sphere of Human Rights", document CJI/doc.522/17 rev. 2, annexed to this Resolution, and send it to the Permanent Council for their appreciation.

2. Exhort the political bodies of the OAS to provide emphatic follow-up on the observations contained in the "Guide of Principles on Social Responsibility of Companies in the Field of Human Rights and the Environment in the Americas" approved by this Committee in 2014, through Resolution CJI/RES. 205 (LXXXIV-O/14), annexed to this Resolution.

This Resolution was unanimously approved at the session held on 9 March 2017, by the following members: Doctors Alix Richard, Joel Antonio Hernández García, Ruth Stella Correa Palacio, João Clemente Baena Soares, José Antonio Moreno Rodríguez, Hernán Salinas Burgos, Duncan B. Hollis, Juan Cevallos Alcívar, Ana Elizabeth Villalta Vizcarra and Carlos Mata Prates.

* * *

CJI/doc.522/17 rev.2

INTER-AMERICAN JURIDICAL COMMITTEE REPORT:

CONSCIOUS AND EFFECTIVE REGULATION OF BUSINESS IN THE AREA OF HUMAN RIGHTS

MANDATE

Resolution AG/RES. 2887 (XLVI-O/16), "Promotion and Protection of Human Rights," was adopted on June 14, 2016 by the forty-sixth regular session of the General Assembly of the Organization of American States (OAS), held in the Dominican Republic. Operative paragraph iii of the resolution, which recalled the contents of resolution A/HRC/RES/26/9, adopted by the United Nations Human Rights Council on July 14, 2014 under the title "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights," emphasized that states have an obligation and the primary responsibility for promoting and protecting human rights and fundamental freedoms and protecting against any abuses committed within their territory and jurisdiction, including by third parties such as corporations, and took note of the report "Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas," adopted by the Inter-American Juridical Committee via resolution CJI/RES. 205 (LXXXIV-O/14), resolving:

1. To call upon the Member States to strengthen mechanisms to establish guarantees to ensure that business enterprises respect human rights and the environment, acting in line with and pursuant to applicable international instruments and domestic laws.

2. To encourage the Member States to consider their participation in national or regional or global initiatives for protecting the human rights of individuals affected by the activities of business;

3. To request that the Inter-American Juridical Committee prepare a compilation of good practices, initiatives, legislation, case laws, and challenges that may be used as a basis for identifying alternatives for addressing the issue, which will be submitted for the consideration of the Permanent Council within one year; and, additionally, require the organs of the inter-American human rights system to make contributions and share experiences on the process. The execution of the mandate envisaged in this resolution shall be subject to the availability of financial resources in the program-budget of the Organization and other resources.

Operative paragraph 3 of the resolution contains the mandate issued to the Inter-American Juridical Committee to prepare a compilation of good practices, initiatives, legislation, case law, and challenges that may be used as a basis for identifying alternatives for addressing the issue. During its 89th Regular Session, held in Rio de Janeiro, Brazil, October 3-14, 2016, the Inter-American Juridical Committee appointed the undersigned as Rapporteur for this topic, with the responsibility of submitting a report to the 90th Regular Session, scheduled for the week of March 6-10, 2017 in Rio de Janeiro.

This report is thus a compilation of the good practices and initiatives under way at the global and regional level for subsequent identification of domestic legislation, case law (including that of the inter-American human rights system), and challenges in the Americas that can be used as a basis for identifying alternatives to better address the issue.

While corporations have great potential for boosting economic growth and thereby lowering poverty indices, they may not always be willing to guarantee human rights. That is why the relationship between human rights and corporate social responsibility became increasingly important in the 1990s with the rapid economic growth stimulated by globalization.

It is even more so today, because in recent years, more attention has been paid to the obligations of non-state actors, especially corporations, because of their power to affect basic rights (corporate responsibility), which can be violated through their employment practices or the way in which their production processes impact workers, communities, and the environment.

a) Global initiatives

The human rights and business relationship has received a great deal of attention in the United Nations (UN) in recent years. In 2008, the UN Secretary-General appointed a Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Prof. John Ruggie of Harvard University, whose mandate ended in March 2011 with the development of the "Guiding Principles on Business and Human Rights," produced under the United Nations' "Protect, Respect, and Remedy" framework.

The position of Special Representative was created in 2005 at the request of the former United Nations Commission on Human Rights. Its purpose was to help reach a universal consensus on the role of States and businesses relative to the impact of business activities on human rights, since a document entitled "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" had not been approved in 2003. These norms were intended to establish once and for all the responsibilities of business vis-à-vis human rights and the environment. The sweeping obligations they imposed on business activities to guarantee respect for basic rights was why the document did not garner widespread support from the States, who argued that it lacked a legal foundation.

This led one year later to a request from the former Commission on Human Rights, now the Council on Human rights, that the UN Secretary-General appoint a Special Representative for this topic to investigate and clarify basic legal and policy aspects in reference to business and human rights, resulting in the appointment of Prof. Ruggie, who developed the Ruggie Framework or the Ruggie Principles.

These Principles, 31 in all, focus on three basic areas:

1. The State duty to protect against human rights abuses by third parties, including businesses;
2. The corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing the rights of others;
3. The need for access by victims to effective remedies through access to the courts of the business's country of origin–that is, greater access by victims to effective remedies, judicial and non-judicial; in other words, effective compensation.

These Principles reaffirm the duty of States to protect their nationals from any infringement of their rights, whether by the State itself or third parties.

The focus of Prof. Ruggie's mandate from the United Nations was:

a. To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
b. To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
c. To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";
d. To compile a compendium of best practices of States and transnational corporations and other business enterprises.

The obligations of Corporations can be summarized as the level of political commitment and the responsibility to act with due diligence and remedy or compensate for the harm inflicted. In this regard, the Ruggie mandate was based on the following:

1. The State duty to protect individuals against human rights abuses by third parties;
2. The corporate responsibility to respect human rights; and,
3. The existence of appropriate legal mechanisms (judicial or non-judicial) for conflict resolution.

Concerning the relationship between human rights and corporate social responsibility, there was the perception that protecting human rights was solely the responsibility of States and that corporations were required to respect the domestic laws of the States in which they did business. Today, corporations are required to respect human rights as an essential part of their social responsibility, not to mention that protecting and guaranteeing human rights fosters a more positive view of their business, since it enhances their reputation and increases the motivation of their employees, customers, and users.

Corporations must also consider how to help avoid human rights abuses by third parties; thus, they also have the duty to protect individuals from abuses by third parties.

Thus, corporations are required to respect, protect, and enforce respect for human rights just as States are and must be knowledgeable about the international norms governing both corporations and human rights. Corporations' duty to respect human rights therefore implies both the obligation to refrain from infringing on the human rights of third parties and the need to remedy the negative consequences to these parties in which they have some involvement.

States, in turn, are the main entities responsible for guaranteeing the human rights of all people and for protecting people against any infringement of those rights by a third party, be it a physical or a legal person. They are also required to take the necessary steps to guarantee the effective enjoyment and exercise of these rights.

States must therefore learn about the principal international norms governing Corporations and Human Rights, which include:

The 1976 Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development (OECD); the 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the International Labour Organization (ILO); the United Nations Global Compact on human rights, labor standards, the environment, and

anti-corruption; the 2006 Performance Standards on Environmental and Social Sustainability of the International Finance Corporation [TN: Check date. Current standards went into effect in 2012]; the Ruggie Framework of 2008 [TN: 2011? That was the year UN Human Rights Council endorsed them.], unanimously approved by the Human Rights Council; the 2010 standard "Guidance on Social Responsibility" (ISO 260000) of the International Organization for Standardization; and the Guiding Principles on Business and Human Rights of June 16, 2011, approved through United Nations Resolution 17/4. A/HRC/RES/17/4 of July 6, 2011.

The UN Guiding Principles, which have become the global frame of reference on business and human rights for all stakeholders that directly or indirectly have duties, responsibilities, or legitimate interests related to commercial and business activity and are the global standards of conduct expected of all businesses and States with respect to human rights and business activities, focus on: the State duty to prevent the infringement of human rights by corporations in their territory and abroad; corporate responsibility to respect human rights through due diligence measures aimed at preventing negative impacts, and the right of victims to remedies.

The purpose of the Guiding Principles is to establish universally applicable and feasible guidelines for the prevention and provision of effective remedies for corporate human rights infringements. As established by the Office of the United Nations High Commissioner for Human Rights, they should be understood as:

> a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

On July 14, 2014, the United Nations Human Rights Council adopted Resolution A/HRC/RES/26/9 on the elaboration of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. To this end, it created an open-ended intergovernmental working group on this issue to elaborate a legally binding agreement on human rights applicable to transnational corporations and other business enterprises. This resolution was an initiative mainly of Ecuador and South Africa.

It should be borne in mind that the Guiding Principles and the legally binding instrument on corporate responsibility complement one another.

Once completed, this instrument could oblige States to require corporations to adopt policies and procedures for the detection, prevention, or mitigation of human rights abuses committed in the course of their activities, which is why it has had many detractors (both States and businesses) and why a series of human rights abuses that may be as serious as those committed by State agents have been committed today through business activities. The issue therefore remains on the agenda of the United Nations Human Rights Commission.

In addition to these international norms, the human rights and business situation falls under all international human rights instruments, both global and regional. Corporations must therefore protect and guarantee all these rights.

The distribution of responsibilities between States and corporations is still evolving and developing, as is the distribution between corporations and the individuals who run them. Consequently, there is a clear trend toward expanding human rights obligations beyond States and applying them to individuals or third parties.

Today, it is very common to see human rights abuses by corporations in mining areas and operations, where the responsibility lies not only with the companies but with the States in which the mine is located and where the transnational corporation is headquartered.

All businesses, whatever their nature and size, have a corporate social responsibility to respect human rights and must therefore make a political commitment to respect these rights, doing so with due diligence and identifying, preventing, mitigating, and taking responsibility for human rights abuses and using mechanisms to compensate for any direct or indirect harm caused by these abuses.

In 2011, corporations were provided with operational guidance on their corporate responsibility to protect human rights through the Guiding Principles on Business and Human

Rights, which are consistent with international human rights norms and international humanitarian law, to ensure their compliance with the United Nations Protect, Respect, and Remedy Framework.

Support for these principles has also come from other international agencies, such as the Organization for Economic Co-operation and Development (OECD), which included them in its 2011 update of the Guidelines for Multinational Enterprises; the International Finance Corporation, which provides loans to businesses in developing countries to promote economic development and poverty reduction and whose social and 2012 environmental sustainability policy recognized the responsibility of the private sector in the field of human rights; and the European Commission, which issued a new social and corporate responsibility policy stating that European companies must respect human rights.

Corporations will therefore have a coherent inclusive framework that will enable them to pursue their activities, policies, and procedures in a manner that respects human rights–a framework whose application will be based on the specific qualities and nature of the business. The Guiding Principles on Business and Human Rights spell out the major steps that corporations must take to guarantee respect for human rights.

These principles were created to clarify and explain the consequences deriving from the current framework of international human rights instruments and offer guidance on how to put them into practice.

In light of the above, application of the Ruggie Framework by corporations should be compulsory; legal mechanisms requiring businesses to fulfill their duty to protect human rights should be adopted, and enterprises should receive training in good practices, since they are not only responsible for preventing the violation of basic rights but must actively work to guarantee that these rights are a reality. In other words, they have an obligation to ensure that these rights are respected, even by third parties.

Furthermore, corporations must establish due diligence procedures to respect human rights in order to identify both the people who might be affected by their activities and the rights that could be infringed upon, determining what action should be taken to mitigate or prevent their impact.

This is because while the Ruggie Principles are not compulsory, they are an important legal advance toward creating a legally binding instrument that would allow enterprises to be held liable for human rights abuses and remedies, as established in Resolution A/HRC/26/L.22 of the United Nations Human Rights Council of 2014.

It is important to recall John Ruggie's celebrated remark that he knew of no business that had gone bankrupt because it had invested in human rights, but he did know of some that had because they had not.

b) Regional initiatives

The Organization of American States (OAS) has issued international norms on this topic, primarily through resolutions of the OAS General Assembly in the form of recommendations, expressing its concerns in this regard. It began addressing the issue in 2001 through General Assembly Resolution AG/RES. 1786 (XXXI-O/2001) instructing the Permanent Council to examine the topic in order to define its scope and content, with a view to informing the OAS Member States and disseminating information within them about the different aspects of the norms.

The topic has been addressed in subsequent OAS General Assemblies, which have recommended implementation of the norms by the Member States, explicitly stating that businesses should establish a corporate social responsibility policy, especially in the area of human rights and the environment.

This issue was recently addressed at the OAS General Assembly held in the Dominican Republic in June 2016, through resolution AG/RES. 2887 (XLVI-O/16) "Promotion and Protection of Human Rights, adopted on June 14, 2016. Operative paragraph iii of the Resolution, "Conscious and effective regulation of business in the area of human rights," recalled the content of resolution A/HRC/RES/26/9, "Elaboration of an international legally binding instrument on

transnational corporations and other business enterprises with respect to human rights," which the United Nations Human Rights Council had adopted on July 14, 2014; stressed that the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations; and took note of the report "Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas," [sic] adopted by the Inter-American Juridical Committee via Resolution CJI/RES. 205 (LXXXIV-O/14), resolving:

1. To call upon the Member States to strengthen mechanisms to establish guarantees to ensure that business enterprises respect human rights and the environment, acting in line with and pursuant to applicable international instruments and domestic laws;
2. To encourage the Member States to consider their participation in national or regional or global initiatives for protecting the human rights of individuals affected by the activities of business;
3. To request that the Inter-American Juridical Committee prepare a compilation of good practices, initiatives, legislation, case law, and challenges that may be used as a basis for identifying alternatives for addressing the issue, which will be submitted for the consideration of the Permanent Council within one year; and, additionally, require the organs of the inter-American human rights system to make contributions and share experiences on the process. The execution of the mandate envisaged in this resolution shall be subject to the availability of financial resources in the program-budget of the Organization and other resources.

The Inter-American Juridical Committee has addressed the issue in the report by Rapporteur Fabián Novak Talavera, entitled "Corporate Social Responsibility in the Area of Human Rights and the Environment," approved by Resolution CJI/RES. 205 (LXXXIV-O/14).

The report details the resolutions on this topic adopted by the regular sessions of the OAS General Assembly and the various Inter-American Conferences held since 2002 in different States of the hemisphere by the Multilateral Investment Fund of the Inter-American Development Bank (IDB), pursuant to the mandate of the III Summit of the Americas, held in Québec, Canada, in April 2001.

These conferences are attended by government authorities, experts, entrepreneurs, academics, and representatives of institutions working in this area, with the object of implementing a social responsibility policy. Thus, the issue is being studied throughout the Americas.

In his report, the Rapporteur references the domestic legislation of the OAS Member States on corporate social responsibility and presents a set of "Guiding Principles on Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas." (See annex)

c) Some domestic legislation in the region

The Argentine Republic has Law No. 25877 of June 2004 (the Law on Labor Order), Chapter IV of which states that domestic or foreign enterprises must prepare an annual social balance statement for the company. This law is supplemented with Law No. 2594 of December 6, 2007, which regulates the content and scope of the Social and Environmental Responsibility Balance Statement.

Costa Rica's 2010 Framework Law on Corporate Social Responsibility requires business enterprises to submit a social balance statement on their activities, describing the policies, practices, and programs implemented to promote sustainable human development. The Law on Corporate Social Responsibility in Tourism, also enacted in 2010, encourages businesses to participate in social responsibility programs.

El Salvador has no specific regulation on corporate social responsibility. However, Environmental Decree Law No. 233 of 1998 offers fiscal benefits to enterprises that have environmentally sound procedures, projects, or products or support natural resource conservation.

The United States of America has the Alien Tort Statute, enacted in 1789, which is part of the U.S. Code. This statute makes enterprises liable for any human rights abuses committed in the

United States. The country also has laws to discourage or prohibit the acquisition of goods or services produced or provided by businesses in violation of human rights. These statutes include the 1930 Tariff Act on the importation of goods produced through forced labor, the 1977 Foreign Corrupt Practices Act, the 2000 Trafficking Victims Protection Act, and Sections 1502 and 1504 of the 2012 Consumer Protection Act.

Jamaica has no specific legislation on the subject. However, the 2004 Companies Act establishes the legal obligation of enterprises to exercise corporate social responsibility in their operations to protect society and the environment, requiring them to safeguard not only their own interests but those of their employees and the communities in which they operate. Furthermore, the 1996 Maritime Areas Act makes it the obligation of every individual and enterprise to respect the environment.

Mexico has several laws with provisions establishing corporate social responsibility, especially in the areas of employment and the environment. They include the Federal Labor Law, the Federal Law to Prevent and Eradicate Discrimination, and the General Law for the Disabled. Mexico is also promoting Social Responsibility Guidelines-NMX-SAST-2600-IMNC-2011/ISO 26000: 2010, which contain the principles and issues enshrined in the concept of social responsibility. In addition, with the advent of NAFTA (the North American Free Trade Agreement), Mexico had to adopt business practices consistent with respect for human rights and the environment, giving the country more opportunities to sell its products to customers in Canada and the United States.

In Peru, Supreme Decree No. 015-2011-TR created the Ministry of Labor and Employment Promotion's Peru Responsable program as part of the deployment of inclusive policies and dialogue among the State, society, and the private sector. To support this program, public policies promoting corporate social responsibility were designed. Furthermore, Chapter 4 (Enterprise and the Environment) of the General Environment Law (Law No. 286111) of October 13, 2005, imposed a series of obligations on enterprises.

The Peruvian private sector has also taken up this issue and in the 1990s created a private organization (Peru 2021) that encourages corporate social responsibility as part of the new national vision that the country was promoting.

It is important to encourage the other States in the region to enact domestic laws, either specific or generic, on corporate social responsibility so that they have binding legislation.

While domestic legislation imposes obligations on corporations, the international corporate responsibility to respect human rights imposes a further degree of responsibility, meaning that even if States do not oblige corporations that violate domestic laws to follow them, enterprises are still responsible for respecting human rights.

Pursuant to the resolutions of the United Nations and the Organization of American States, some States have indicated their commitment to the issue of business and human rights. Chile, for example, has stated its commitment to honoring the UN Guiding Principles and the results of the special regional session on the topic that was held by the Organization of American States in January 2015.

Thus, through its Ministry of Foreign Affairs, Chile is preparing to develop a National Plan of Action on Human Rights and Business, based on the contributions provided at the global and regional level and the participation of all stakeholders. To ensure an open, inclusive, and transparent dialogue, it held a National High-level Seminar in April 2015 to begin discussions on this issue.

Colombia, in turn, published Public Policy Guidelines on Human Rights and Business in July 2014. These guidelines, which take the international norms in this area into account, culminated in a national plan of action on business and human rights that was closely aligned with the United Nations Guiding Principles. Talks then began with civil society and business to ensure a genuinely consensus-based plan.

The plan, called the National Plan of Action on Business and Human Rights, is now a reality in Colombia and was launched by President Juan Manuel Santos to ensure that businesses operate with absolute respect for human rights.

This Plan is a living document containing lines of action to guarantee that State entities create the basic conditions requiring businesses to operate with absolute respect for human rights.

This instrument is the result of a consensus among business and civil society organizations, with support from the international community. Based on the recommendations of the United Nations Working Group on Business and Human Rights, which should be tailored to the situation in each country, these recommendations signify the start of the new State role as guarantor of the rights of citizens in their interaction with businesses.

All OAS Member States should follow the example of Chile and Colombia and share experiences with these two States so that they, too, can develop a National Plan of Action on Human Rights and Business in their countries through a dialogue with all key stakeholders–the State, businesses, and civil society–taking into account all the global and regional progress made to date.

d) Cases and case law in the inter-American human rights system

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have issued a series of norms and recommendations for States on human rights and business, in which the latter plays an important role. This is especially true in the case of natural resource extraction and the rights of indigenous peoples infringed by the pollution caused by factories and mining operations, which have deprived many communities of their livelihoods and water sources and have even altered their social make-up.

This is because private investment in natural resource extraction has substantially increased in Latin America. Naturally, this has had both a positive and negative impact, spurring economic growth and, at the same time, social conflict, due to human rights abuses. Corporations have a responsibility to avoid infringements of human rights resulting from activities that lead to the arbitrary displacement of populations and must provide remedies for such infringements.

They must therefore ensure that their activities do not cause or contribute to human rights abuses and must provide remedies for these abuses when they arise.

That is why United Nations Special Representative John Ruggie stated that respecting human rights means that corporations must be proactive and take steps to discover and prevent human rights abuses and respond to them.

In this regard, since 2004, the Inter-American Commission on Human Rights has kept a registry of thematic hearings on conflicts of interest between the rights of indigenous peoples and private companies involved in natural resource extraction, where human rights abuses have occurred.

These hearings include: Situation of Indigenous Peoples with regard to Extractive Industries, of March 2004; Human rights and global warming, of March 2007; Situation of people affected by the mining and petroleum extraction industries in Ecuador, of March 2007; Right to Consultation of the Indigenous Peoples of the Amazon Region and Implementation of Projects of the Initiative for the Integration of Regional Infrastructure in South America, of March 2010; Human rights situation of people affected by mining in the Americas and the responsibility of mining companies' host States and States of origin, of November 2013, and Extractive Industries and Human Rights of the Mapuche People of Ecuador, of March 2015; Responsibility of Canada for human rights violations committed by its mining companies in Latin America, of 2015, and two other hearings in 2015 on the need to consider the responsibility of companies' States of origin, called Human Rights and extractive industries in Latin America (topic of extraterritoriality).

In addition to the thematic hearings, cases have also been brought before the Inter-American Human Rights system, among them: Yanomami v. Brazil, in 1985; Maya Indigenous Communities v. Belize in 2000; Mayagna (Sumo) Awas Tingni Community *v.* Nicaragua, in 2001; Kichwa Indigenous People of Sarayaku *v.* Ecuador, in 2004; Community of San Mateo de Huanchor and its members *v.* Peru, in 2004; Ximenes Lopes *v.* Brazil, in 2006; Saramaka People *v.* Suriname, in 2007; Xákmok Kásek Indigenous Community *v.* Paraguay, in 2010.

Many of these cases have been litigated before the Inter-American Court of Human Rights, which has found States liable for human rights abuses and damage to the environment, creating a

precedent for establishing international liability when the State acknowledges that private enterprises violate human rights and the State does not meet its obligation to supervise them, since enterprises are required to provide remedies in the case of domestic human rights abuses.

Here it is important to bear in mind Article 36 of the OAS Charter, which States:

> Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.

The Inter-American Commission on Human Rights has also recognized that the obligation to investigate human rights violations committed by private parties is enshrined in both the Universal Declaration of Human Rights and the Inter-American Convention on Human Rights and that the *erga omnes* nature of the obligation to protect and guarantee human rights is present in the jurisprudence of the Inter-American Court of Human Rights, both in its Judgments and its Advisory Opinions. Hence, we have Advisory Opinion OC-18/03 of September 17, 2003 on Juridical Condition and Rights of Undocumented Migrants, in which the Court establishes the obligation of States to guarantee the right to equality and non-discrimination in relations between employers and migrant workers, which means guaranteeing human rights in the face of potential violations by private parties.

The Inter-American Court of Human Rights, in turn, ruled in the case of the Saramaka People *v.* Suriname in 2007 that the obligation of the State to protect includes the obligation to prevent human rights abuses committed by third parties or non-State actors. While it is true that the Court did not specifically use the term "business enterprises," in the case of Sarayaku v. Ecuador in 2012, Judge Antonio Augusto Cançado Trindade of the Inter-American Court of Human Rights, stated that the *erga omnes* nature of international obligations requires protection from any potential abuse, including [by] enterprises.

The Inter-American Commission on Human Rights has also examined the issue of State responsibility for abuses by enterprises through individual cases, precautionary measures, thematic hearings, and country reports, especially when business operations have threatened the right to life through activities that affect the environment.

Up to now, the main target of legal complaints has been the States, since they have the primary responsibility for preventing and addressing human rights abuses by enterprises. This has led to the need for a mechanism to determine the liability of enterprises for human rights abuses. Thus, the inter-American human rights system must proceed with discussions in this area, since in recent years, the international community has taken up the issue of corporate responsibility in the field of human rights.

e) Good practices

It should also be noted that good corporate practices in human rights and business have been observed in the region, since business has gradually embraced the concept of social responsibility. Some companies have made social and environmental issues a priority, creating programs to promote education, health, cultural awareness, housing, social assistance, environmental protection, respect for the human rights of workers, credit lines, greater job opportunities, and so forth.

The Americas' business sector should follow these examples and abandon deleterious practices in business and human rights, guaranteeing respect for human rights and approaching the issue with the seriousness and commitment it deserves.

Good practices must also include the obligation of businesses to respect human rights and compensate victims when their rights have been violated by corporate activities. Companies therefore must draw up codes of conduct in which they commit to aligning their activities with the Guiding Principles on Business and Human Rights, ensuring that their provisions include a commitment to contract suppliers and subcontractors that respect human rights and to agree to audits, as well as State supervision through oversight agencies.

In the Inter-American context, based on the resolutions of the General Assembly of the Organization of American States and the thematic hearings and cases brought before the inter-

American human rights system, the domestic human rights institutions of the States should take up the issue of human rights and business and foster a constructive dialogue among business, States, and relevant civil society stakeholders so that the necessary legal frameworks for protecting and guaranteeing human rights can be implemented.

f) Challenges

It should be borne in mind that when the international framework for the protection of human rights was designed, business did not play a prominent role. Today, however, many human rights abuses are caused by omissions or the direct action of transnational corporations and other enterprises. Thus, global and regional human rights bodies must be prepared for these new situations and be ready to apply all the international human rights instruments.

With these instruments in mind, corporations must make commitments and draw up codes of conduct whose purpose is: To support and protect the human rights proclaimed globally and regionally; ensure that they are not complicit in human rights abuses; respect all labor laws; eliminate all forms of forced and compulsory labor; eliminate human trafficking; abolish child labor; eliminate discrimination in the workplace; protect the environment and become environmentally responsible; support the fight against transnational organized crime, etc.

In light of this, what challenges may be facing the inter-American system given this new relationship between business and human rights, and how can the efforts of the different OAS organs be channeled to tackle these challenges?

To address this situation, pursuant to resolution AG/RES. 2840 (XLIV-O/14), adopted by the OAS General Assembly on June 4, 2014, the Committee on Political and Juridical Affairs of the Organization's Permanent Council held the First Special Session on Promotion and Protection of Human Rights in Business on January 29, 2015. The meeting's participants included various OAS authorities and bodies, including the Inter-American Juridical Committee, whose Chair submitted the Rapporteur's report, "Corporate Social Responsibility in the Area of Human Rights and the Environment in the Americas."

At this meeting, the United Nations Guiding Principles on Business and Human Rights of 2011 were recognized as an important legal reference, as was the need to address this issue in the region and disseminate the pertinent resolutions of the OAS General Assemblies. It was also recommended that the States continue discussing the issue and learn about and share their experiences, taking advantage of the work of other organizations and relevant stakeholders in the field.

It was noted that in recent years, the issue had been addressed by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which had developed standards and issued recommendations for the protection of human rights in relation to business.

Representatives of the United Nations Working Group on Business and Human Rights also participated in the session, along with civil society representatives and delegations from the participating States, who informed the session about the legislative advances in their countries in this area.

Civil society organizations, in turn, called on the Inter-American Commission on Human Rights to give due attention to the issue, requesting, among other things: that it impose greater obligations on States to supervise business activities in cases of human rights abuses and that it establish binding obligations for business; that it promote respect for human rights by corporations; that, based on the doctrine and jurisprudence of the inter-American human rights system, it develop specific measures to ensure that States oversee business activities to prevent human rights abuses; that it improve access to justice by the victims of human rights abuses committed by corporations; that it prioritize the processing of individual petitions on extraterritorial responsibility; that OAS authorities promote a constructive dialogue among Sates, businesses, relevant civil society stakeholders, and other social sectors to effectively address the problem; and it create a binding mechanism to enforce the United Nations Guiding Principles on Business and Human Rights.

While it is true that the inter-American system has not adopted binding regulations on human rights and business, the issue has been a matter of serious concern in the Organization of American States, whose General Assembly has issued many resolutions in this regard. It has also been addressed in the doctrine and jurisprudence of the inter-American human rights system, which has established the precedent that international responsibility can apply when States tolerate the violation of human rights by corporations and when States fail to exercise their oversight function. The issue has also been addressed by other bodies of the Organization, such as the Inter-American Juridical Committee, which in Resolution CJI/RES. 205 (LXXXIV-O/14) even proposed Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and Environment in the Americas".

To meet this new challenge, the Organization of American States (OAS) has held meetings and issued reports on human rights and business, with the object of finding effective, coordinated solutions to ensure that businesses respect human rights through dialogue among States, enterprises, and civil society.

g) Alternatives for addressing the issue

Global and regional action should be coordinated to avoid splintering the issue and to support the Open-ended Intergovernmental Working Group's efforts in the United Nations Human Rights Council to draft a binding legal instrument (treaty) on human rights that is applicable to transnational corporations and other business enterprises, as agreed in United Nations Resolution A/HRC/RES/26/9.

With respect to reaching a consensus with all stakeholders in the group on the topics to be covered in the binding legal instrument on business and human rights, the following examples can be cited: the Guiding Principles on Business and Human Rights of 2011; creation of the respective compensation mechanisms; the assignment of responsibility to all types of enterprises, whether transnational, state, or local; the regulation of all matters connected with the extraterritorial obligations of States in regard to human rights abuses committed by corporations and the development of the regulatory framework necessary for declaring businesses liable for human rights abuses and exacting the respective compensation.

To reach the necessary consensus on this issue, these sessions of the Open-ended Intergovernmental Working Group should involve not only the developing States but the developed States and civil society as well.

It is recommended that, to participate in the meetings of the Open-ended Intergovernmental Working Group, the Organization of American States (OAS) also designate a Special Representative on Business and Human Rights for the Inter-American System to interface with the United Nations Special Representative on Business and Human Rights and share experiences and information in this regard; in particular, it is recommended to support adoption of the legally binding instrument on business and human rights as part of the international framework.

OAS Member States that have not done so should be urged to include domestic regulations on human rights and business and corporate social responsibility in their legal framework by through a specific or generic regulation to ensure that they have clear and transparent domestic legislation to enforce in this area.

When negotiating and signing bilateral and multilateral free trade agreements, OAS Member States should introduce a chapter with clauses on human rights and collective rights for companies that protect and guarantee the human rights of individuals and provide remedies in cases of human rights abuses.

Some academics and social organizations working in human rights suggest the advisability of considering that the Inter-American Commission on Human Rights, an OAS Member State, or another OAS body request that the Inter-American Court of Human Rights issue an Advisory Opinion stating whether the State is required to provide protection from business activities and whether free trade agreements or domestic investment laws must be consistent with the Inter-American Convention on Human Rights in this regard, thereby contributing with their experience on the matter.

The current international standards on business and human rights should also be publicized throughout the inter-American system. That is, efforts should be made to disseminate and continue promoting application of the United Nations Guiding Principles on Business and Human Rights and the Ruggie Framework of 2011. Furthermore, the pertinent resolutions of the UN Human Rights Council and the OAS General Assembly should be publicized, along with the reports and cases heard by the Inter-American Commission on Human Rights, and the Judgments and Advisory Opinions handed down by the Inter-American Court of Human Rights, so that both the States and corporations are familiar with them to ensure that they meet their obligation to respect human rights.

The inter-American human rights system should work to ensure that corporations respect human rights. To this end, States should duly supervise business activities and impose binding obligations on corporations, since the System has developed very good standards for the protection of these rights, in which prevention and dialogue play an important role.

As previously stated in this report, it is important for the domestic human rights institutions of OAS Member States to encourage a positive and constructive dialogue among States, businesses, civil society, and other relevant stakeholders on practical application of the United Nations Guiding Principles on Business and Human Rights and for these principles to become part of a binding international legal instrument.

The creation of international standards for the identification of human rights abuses committed by businesses has been a basic qualitative step forward in assigning responsibilities and broadening the range of opportunity so that a greater number of vulnerable individuals and groups can benefit from projects that improve their quality of life while respecting their rights.

However, to meet these standards, States must institute public policies or plans of action, as Colombia recently has, with input from all relevant sectors, with a view to drafting an inclusive plan with the State, civil society, and private sector, with support from the international community.

Efforts must be made to raise awareness in the Americas about the United Nations Guiding Principles on Business and Human Rights, the Ruggie Framework, and the achievements of the inter-American system, developing international standards that the majority of American States embrace in their policies or plans of action, so that businesses adopt the Guiding Principles, States pressure for respect for human rights, and people are increasingly aware of their rights.

National plans of action should be implemented to put the Guiding Principles on Business and Human Rights into practice. All stakeholders should be involved in drafting these plans, which should also contain broad monitoring and evaluation mechanisms, an activities strategy, and effective remedies for the victims of human rights abuses, thus guaranteeing protection and respect for those rights. These plans should be publicized throughout society.

I would like to express my gratitude to the OAS Secretariat for Legal Affairs Department of International Law, whose fully documented report “Business and Human Rights” supplements this report and has contributed to a better understanding of the issue.

Attached

Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and Environment in the Americas

a. Enterprises, in the course of their activities, should adopt internal preventive measures and measures to protect human rights, environmental law, and the labor rights of their workers and the populations where they operate.

   To that end they should implement policies, for example, to eliminate all forms of discrimination, child labor, and forced labor; respect the right of workers to unionization, collective bargaining, and workplace health and safety; the use of clean technologies and ecologically efficient extraction procedures; among other measures, according to international law.

b. Enterprises should respect the environment, property, customs, and ways of life of the communities where they operate, seeking to cooperate and contribute to their economic, social, and environmental development.

c. Enterprises should encourage their providers and contractors to respect the rights mentioned in the first item of these Guidelines, so as not to become complicit in illegal or unethical practices.

d. Enterprises should conduct training activities for their officers and employees, so that they will internalize the commitment to corporate social responsibility.

e. Enterprises should conduct studies of the impact their activities will have, which should be presented both to the authorities and to the population in whose environment they will operate.

f. Enterprises should have emergency plans for controlling or mitigating potential serious harm to the environment stemming from accidents in the course of their operations, as well as systems for alerting authorities and the population, so that swift and effective action may be taken.

g. Enterprises should redress and deal with damage brought about by their operations.

h. Corporate social responsibility pertains to all enterprises, regardless of size, structure, economic sector, or characteristics; however, policies and procedures established by them may vary according to these circumstances.

i. Enterprises should take the necessary measures to ensure that consumers receive the goods or services they produce with the appropriate levels of quality in terms of health and safety. To that effect, it is essential that the good or service carry sufficient information on its content and composition, eliminating deceptive trade practices.

j. Enterprises and the States where they operate should strengthen, respectively, their internal and external systems for the follow-up, monitoring, and control of compliance with labor rights, human rights, and environmental protection laws.

   This necessarily involves State implementation of efficient policies for the inspection and supervision of enterprises in the course of their activities as well as the enterprises' establishment of policies to ensure respect for human rights and environmental laws in their operations.

Both monitoring mechanisms should consult outside sources, including the parties affected.

k. Internal and external monitoring mechanisms should be transparent and independent of the businesses' control structures and of any sort of political influence.

l. This should be complemented with the establishment of incentives or means of recognition, both governmental and private, to benefit or distinguish enterprises that are actively committed to corporate social responsibility.

m. States should require enterprises with which they conduct commercial transactions or which present competitive bids to comply fully with the obligations noted in item (a) of these Guidelines.

n. Enterprises should also guarantee that parties potentially affected by their activities have recourse to internal claim mechanisms that are swift, direct, and effective.

o. Parties potentially affected by an enterprise's activities have the right of resourse to administrative, judicial, and even extrajudicial claim mechanisms that are effective, transparent, and expeditious.

p. The principles of corporate social responsibility should be publicized, as should good business practices that have benefited both the local communities where enterprises operate and the enterprises themselves.

   Corporate social responsibility should be part of a culture shared and embraced by all, to which end it is essential to train and sensitize entrepreneurs, authorities, and public opinion in general.

q. Other actors should participate in this effort, from universities and research centers, providing skills and ideas to improve business behavior, through NGOs, unions, social organizations, communications media, and churches, who can serve as instruments of pressure or condemnation but also as organs of support and cooperation.

r. Business guilds or associations can be key actors in the conscious, voluntary strengthening of corporate social responsibility, providing technical advice and training, establishing networks for the exchange of information and discussion of experiences among enterprises, and creating incentives and prizes, among other measures.

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OTHER TOPICS

1. Reflection on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law

Document

CJI/doc.531/17 Reflection on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law: a compilation of themes of interests
(Presented by Dr. Ruth Correa Palacio)

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2015), the members of the Juridical Committee decided to begin a process of reflection with a view to improving its performance for the Organization and the States. It asked Dr. Correa Palacio to compile a list of topics suggested by members to serve as a basis for the drafting of the multiyear agenda, taking into consideration the needs of the Organization and the States as a whole.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2015), the space for reflection that began at the previous session carried on. On that occasion, Dr. Correa Palacio introduced document CJI/doc.484/15, "Considerations on the Work of the Inter-American Juridical Committee: compilation of topics of interest," which covers three focuses of work: 1) procedural work; 2) substantive work; and 3) topics suggested by other Committee Members. The first group includes considerations of a procedural nature of the Inter-American Human Rights Protection System, which emerge from dialogue held with the President of the Inter-American Court of Human Rights. She also encouraged inclusion of concerns expressed by Secretary General Luis Almagro regarding the issue of access to justice and equity.

After brief discussions on the proposal made by Dr. Correa, the topics agreed upon were in summary the following: 1) drafting a preliminary plan for the next session (April 2016); 2) presenting to the political bodies of the OAS a list of topics that are expected to be addressed in the long term; and 3) appointment of Dr. Correa Palacio as Rapporteur for the Topic.

Dr. Correa recalled the concern voiced by Committee Members about setting themselves a medium - and long-term agenda. She then pointed out the existence of whole spheres of International Law, such as Private International Law and Human Rights Law, where there are numerous international treaties that, in practice, have not been implemented. She suggested that the Committee should conduct studies in order to understand the reasons why not all States accede to or ratify those treaties. She also alluded to the possibility of holding events of outreach such as the previous day's Round Table, attended by members of government bodies and of civil society.

Finally, she referred to some of the issues discussed on the meeting with experts on Private International Law (Washington D.C., April 4, 2016), such as the continuation of the Committee's work on Simplified Joint Stock Companies, the compilation of commercial practices, and drafting guidelines on Private International Law.

Dr. Salinas commented that the Juridical Committee was by nature a consultative body and should thus serve the interests of the Organization and the Member States. Accordingly, he pointed out that creating guidelines for the implementation of international treaties should be a principal work of the Committee. Second, he recalled that the Committee's work had to be in sync with the Region's interests. As a working procedure, he suggested consulting ministries of foreign affairs and international law associations and asking for their opinions. Third, Dr. Salinas noted that the agenda proposed by the Rapporteur focused mainly on human rights issues and that it involved some overlap with other OAS organs.

Dr. Hernández García recalled the agreements reached at the last CJI session in August 2015 and suggested that points 1 and 3 (drafting a preliminary plan and nominating the Rapporteur) had been complied with, but that it would be good to have the basis for an agenda plan.

He urged the Chairman to meet with the delegations of the countries attending the regular session of the General Assembly, which would take place in July in the Dominican Republic. He also reminded the plenary about the suggestion of meeting with the legal advisers in the ministries of foreign affairs. Both opportunities could result in important feedback.

He expressed concerns of addressing sensitive Human Rights without incorporating issues relating to Public and Private International Law.

Dr. Villalta stated that in her opinion two topics were especially important: compilation of commercial practices and international law guidelines.

Dr. Moreno also congratulated the Rapporteur. He noted that the current political environment was very different from that of the 1970s when the Committee first embarked on its codification of private international law. Today the world needs universal and global solutions. Another change had been the development of alternative sources of law. As an example of that, he cited The Hague Principles on Choice of Law for International Contracts.

Dr. Mata Prates, acting as Chairperson pointed out that the institutionalization of International Law was now based of areas of specialization, as illustrated by international organizations, such as the World Trade Organization (WTO) and the World Health Organization (WHO), and others. He also agreed with what Dr. Moreno had had to say on seeing how arbitration awards were reached in the International Centre for Settlement of Investment Disputes (ICSID).

He noted that the job of the Juridical Committee should be to serve as a "coordinator" of studies or proposals put forward by other international organizations.

A criterion for selecting issues to work on should be usefulness for the States and for the Organization. In his view, the Committee should perform a pro-active function of notifying States of what the Juridical Committee can -- and wants to - do.

Dr. Salinas proposed having a draft work plan and multi-year agenda ready for the next session.

Dr. Arrighi stated that in his view the Inter-American Specialized Conference on Private International Law process, as practiced thus far, had run its course. He noted, too, that the CIDIPs had emerged as a substitute for the quest for a general codification when the latter had proved unable to resolve the problems that arose some 30 or 40 years ago (e.g., the Bustamante Code). The CIDIPs were designed to establish specific codifications. That had been an eminently Latin American project. The final moment for CIDIP had come with the discussion of consumer rights issues which had mixed public law and private law with mandatory rules, with States governed by civil law and common law. Given that scenario, the CIDIP was not permitted to handle the topic.

In Dr. Arrighi's opinion, we were in a third period in which coordinated efforts were needed to forge instruments that were more democratic, more flexible, and in sync with the global nature of today's problems. As for specific issues, it would be important to resume examination of consumer rights and to address the legal repercussions of environmental protection, which also figured on the Secretary General's agenda.

Dr. Moreno asked whether the subject of torts had already been taken up by the Juridical Committee and what the current status was on that issue.

Dr. Villalta commented that that had been the first subject assigned to her as Committee Rapporteur. She explained that during CIDIP-VI, the subject had been suggested by Uruguay, but no consensus had been reached regarding it during the negotiations. As a result, it was suggested that the Juridical Committee look into it, the idea being that, after working on it, the CJI would draw up a convention or model law.

Dr. Arrighi explained that the Committee had the faculty to suggest topics on its own initiative, so that Dr. Moreno could resume his examination of that substantive issue.

Dr. Hernández García proposed that Dr. Correa consider giving a presentation on the outcomes of the Committee's reflections on topics for the agenda during the meeting with the states' representatives on the CAJP. He agreed with Dr. Arrighi's assessment that the Committee had competence to choose topics on its own initiative. He also concurred with Dr. Salinas' idea of allotting time and setting deadlines for that work.

The Vice-Chairman noted that it would be important to have a provisional agenda to present to the Secretary General and the CAJP.

Dr. Correa proposed focusing on a provisional agenda of substantive issues.

It is worth mentioning that the activities and meetings hold in Washington, D.C. during the 88th Regular Session allowed the Committee to receive suggestions for topics for a possible multi-year agenda.

During 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October 2016), Dr. Ruth Correa mentioned the previous discussions of the Committee members about proposals of new themes, which were received during the last two years, with the aim of preparing a pluriannual agenda.

She highlighted that the list presented in her first report, document CJI/doc. 484/15 rev.1, is a compilation of the topic already mentioned and that Members should use it only as a reference.

She informed that the following themes are still included in the proposal of pluriannual agenda, and that they had been suggested by the members of the Committee:

Soon afterwards, she listed the topics that emerged from the meeting of International Private Law held on the occasion of the 88th Regular Session in April 2016, in Washington, D.C.:

1. Commercial usage and customs;
2. Electronic commerce;
3. Compilation of commercial customs/usage;
4. Rights of consumers;
5. E-commerce;
6. E-payments;
7. Online Resolution of Disputes, the CNUDMI/UNCITRAL principles;
8. Law conflicts in cross-bordering topics;
9. Revision on the perspective of the Americas on the Hague Conference proposed Draft text on recognition foreign decisions;
10. Revision of the themes approved in the CIDIPs;
11. Take up again the discussion of the theme on simplified stock societies/companies.

Dr. Correa explained that all the topics suggested at the meeting with the representatives of the juridical counsellors of the Ministries of foreign Affairs held on 5 October, 2016, are already included in the above list. However, are repeated below for practical purposes:

1. Immunity of jurisdiction;
2. Notices/Notifications;
3. Alternative mechanisms;
4. Arbitration as an alternative means for the resolution of disputes;
5. Presumption in favor of the immunity of States;

6. Law of the Sea.

The Chairman pointed out that this final list of topics is essential to make discussions easier and to determine priorities regarding the topics to be addressed.

Dr. Salinas proposed the following criteria order for the following topics:

1 mandates of the General Assembly;

2 equilibrium between International Public Law and International Private Law;

3 taking into account the suggestions and remarks presented by legal counsels; and,

4 assessing the juridical nature of international instruments.

The topic mentioned by Dr. George Bandeira Galindo should be included in the list of themes to be addressed by the Committee, under the coordination of Dr. Correa. Dr. Galindo is the legal counsel for Brazil in the field of inter-institutional agreements.

The Chairman proposed members to reorganize the suggestions provided by Dr. Ruth Correa in areas such as: human rights, democracy, and international private law, among others. In addition to grouping the topics by areas, priorities should be also established.

Dr. Hernández Garcia proposed developing the topics within a time-framing program, in order to submit a better finished result to the General Assembly. Dr. Salinas added the following criteria to those detailed above:

1 Precision is a must when themes are formulated. For example, in the area of the rights of indigenous peoples, that offers varied facets in view of its widespread nature. This is why the definition of areas/parts to be studied is needed, in addition to their different aspects;

2 themes should be practically useful;

3 Taking into consideration the expertise of each member in order to provide contributions and also to strengthen the result of the work carried out, taking into account the theme´s sophistication;

4 avoid duplicating the work with the results of other forums. For example, the topic on public/government procurement has already been addressed in depth by the CNUDMI;

5 studies must be useful for the OAS, and provide added value to the work of the organization.

6 always bear in mind the availability of human and economic resources of the Committee.

He concluded highlighting four topics that were mentioned by the legal advisers that should be included in the list of topics to be addressed under Dr. Correa´s supervision: 1) Executive and inter-institutional agreements; 2) cybercrimes 3) protection of marine environments; and 4) the role of the reservation observatory in the area of treaties – list of instruments approved and reservations presented. It was suggested to the Secretariat to present these lists for the evaluation of the Committee, determining which reservations or declarations, in their opinion, are not in agreement with the purpose and aim of the treaty.

In a following meeting, the Chairman referred to the list of topics for the multi-annual agenda of the Juridical Committee with the priorities according to consensus that had been drafted on previous sessions. He further recalled that the suggestions made during the meeting with the representatives of the legal counsels of the Ministries of Foreign Relations of the member countries have been included. In this context, he presented the following three-part list:

<u>Mandates of the General Assembly</u>:

- Protection of cultural heritage, and
- Companies, the environment and human rights.

<u>Private International Law topics:</u>

- International Consumer Protection;

- Alternative means for the resolution of disputes (online resolution of disputes and others); and,
- Commercial usage and customary law.

Public International Law topics:

- Immunity of States;
- Immunity of International Organizations;
- Protection of the marine environment and liability of States;
- Cybersecurity; and,
- Legal nature of international interinstitutional agreements.

The Chairman commented that in the area of Private International Law some of the topics appear to be too broad, such as the one on commercial usage and customary law. He also mentioned that new topics 2 and 3 in the area of Private International Law and 3, 4 and 5 in the field of Public International Law. He then proposed the Committee to focus especially these new themes.

Dr. Salinas asked to address the topic on the effects of inter-institutional agreements.

Dr. Moreno stated that these new issues on Private International Law are a follow up on the study on international law, applicable to contracts and consumer law. On the subject of alternative means, they are indeed more specifically related to the issue of consumer rights.

The Chair asked whether the issue of commercial customs and practices would be linked to the issue of international contracts. Then, Dr. Moreno explained that in fact it is a continuation of the discussion presented in the Mexico Convention. He suggested formulating the issue as follows: Principles, customs, usage and practices in international recruitment.

Dr. Salinas said he was doubtful if these two issues on Private Law are immediate. If in fact they are, there may be an imbalance between public and private international law.

The Chairman recalled that, according to the agreement of the members, the issue of International Contracts must be approved in March, and that there will be room for another topic on Private International Law.

Dr. Villalta stated that the working agenda now has two items of Private International Law on it, and that these items address complex matters and, therefore she suggested leaving pending for a later date the analysis of new initiatives.

Dr. Moreno explained that the outcome of the discussion on these two issues on the agenda could lead to new topics. He also noted that the Vienna Convention on the International Sale of Goods creates an opening for non-state rights and for *lex mercatoria*. Therefore, when the current study ends, the Committee should pay attention to such controversial issue. He considered of utmost importance trying verifying how national solutions are handled in order to see how commercial usage and trade customs in the regions are expressed.

The Chairman said he was in agreement with Dr. Moreno´s proposal. As regards the search for balance between Private and Public International Law, he urged to take into account the specializations of each one of the members of the Juridical Committee.

Dr. Stewart asked about the purpose of the study, taking into consideration the rather broad reach of the notion of *lex mercatoria*. He also asked for additional explanations about the topic on institutional agreements, translated to English as "*juridical nature of interinstitutional agreements*".

The Chairman explained that this issue had been brought up by the representatives of the legal advisors of the Ministries of Foreign Affairs and mentioned as one of their most pressing problems. He explained that various organs of governments are signing agreements with entities from other States that often create or infringe international obligations.

Dr. Moreno explained that this is also an issue of Private International Law.

Dr. Mata Prates agreed with the usefulness of a guide on practices on interagency agreements for the foreign ministries of the countries. He explained that in Uruguay there is a draft decree on procedures explaining how to process these arrangements internally, and that it highlights a relationship between public international law and domestic law.

The Chairman recalled that the legal advisor of the Ministry of Foreign Affairs of Paraguay mentioned having worked on a document with guidelines for Paraguay´s internal agencies. This means that together with the Uruguayan decree and with the practices in other countries, there would be elements for working on a guidance document. Furthermore, according to his point of view, legal advisory bodies would be grateful to receive a work of this kind.

Dr. Mata Prates stated that a project had been developed in his country but has not been approved so far, showing the complexity of the matter. He mentioned the internal discussion during the process of approval of the decree. State power companies have warned that if permission needs to be secured every time they sign an agreement of this kind, this could affect the operation of the power system in the country.

The Chairman thanked Dr. Prates for the accurate account of the situation. He said that the problem might be even more complex because some ministries believe they also have the right to sign treaties. However, that is not in accordance with international law in the light of the Vienna Convention on the Law of Treaties, regarding agreements concluded by people with no legal standing. He gave the example of a Peruvian case in which the Ministry of Commerce needed to amend its organic law in order to allow them to sign international treaties.

Dr. Collot mentioned that there are two very important issues in the proposed Agenda: cyber-security and immunities of international organizations. He explained that some people benefit from immunities, and that in this respect is important to understand the possible liability mechanisms. He exemplified by a real case, where a member of an international organization killed a person while driving a car with the logo of the organization. He sought protection under the immunity of the organization. The case was judged and a penalty imposed on the organization, having also its accounts under embargo. However, it never went beyond, and finally the Haitian government intervened and compensated the victim; hence the importance of concentrating on procedures.

Regarding the topics of Private International Law, Dr. Collot stressed the importance of the means for alternative solutions. On the subject of commercial usage and custom, he referred the online system called Legal Data, comprising most commercial instruments with reference to the laws of many countries, totaling 244 instruments (representing about 10% of all trading instruments worldwide). He was also of the opinion that this theme is too broad, and proposed separating it into specific topics.

Dr. Moreno said that regarding the subject of customary practices and usage he was in agreement with its inclusion. However, he proposed that the specific approach or scope of the work or methodology be determine in the future.

Dr. Villalta mentioned that in many Central American countries mayors or heads of department were also signing international agreements. In Nicaragua, for example, a law on border security was passed, as they signed agreements even on border matters. The procedure is forcing the Ministries of Foreign Affairs to review all agreements.

The Chairman requested the Secretariat to present a final list of approved topics.

Thereafter, Dr. Negro presented the final list of topics. He explained that the document would be entitled: List of new topics, and would comprise the following:

1. <u>Topics of Private International Law:</u>

   - Resolution of disputes on consumer issues; and,

   - Principles, usage, customs and practices in international procurement.

2. Topics of Public International Law:

- Protection of marine environment and State responsibility;
- Cyber security; and,
- Legal standing of interinstitutional agreements of an international character.

The Chairman asked the members if they wished to make any comment. Dr. Salinas suggested adding the expression "and its effects" after the expression "legal standing" in the last issue of Public International Law.

Dr. Moreno asked if the topic of institutional agreements was to be included within the categories.

Dr. Mata Prates explained that there is no obstacle to any member being rapporteur of the subject so it was not necessary to change the list.

As there were no other objections, a list of new issues was approved in two areas:

1. Topics of Private International Law:

- Resolution of Disputes on consumer issues; and,
- Principles, usage, customs and practices in international procurement.

2. Topics of Public International Law:

- Protection of the marine environment and State responsibility;
- Cyber-security; and,
- Legal standing and effects of interinstitutional agreements of an international character

The Department of International Law elaborated a document with the list of new topics, document DDI/doc.1/17.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the thematic Rapporteur, Dr. Ruth Correa began her presentation with a bit of background information on the subject for the benefit of the new members. She explained that the Committee had consulted with legal counsel of the Member States, sought the input of academics and had held discussions with experts in international private law to collect the proposals. The collection takes into account some proposals of Member States, the Secretary General and Committee members as well.

She also explained the interest of the members in respecting certain criteria in the selection of new topics, aimed at organizing the work plan and setting priorities among the proposed topics. Among these criteria, the Rapporteur underscored the following: to classify the lists by area, either private or public international law; to strike a balance between the two areas; to be specific or concrete; to take into account its practical application and the particular areas of specialization of the Committee members; to avoid duplicating efforts made by other international organizations; to provide added value; to consider human and financial resources. She concluded her presentation by suggesting that the list should form the basis for a work plan, yet to be defined.

The Chair noted that the new members might also want to add new topics. He said that he had already spoken with Dr. Hollis, who had expressed interest in taking on a study about cyber-security, a field over which the legal advisors have expressed serious concern. Secondly, he said it was necessary to remove from the list those topics that the Committee had already dealt with, even if at some point in time the topic may return (i.e., cultural property, etc.).

Dr. Villalta proposed moving a couple of topics to the IPL group, and everyone agreed.

For the benefit of the new members, she and the Chair explained that the legal advisors had raised the question on the status of "simplified" or "executive" agreements that do not require ratification or the non-binding "MOU" as these are all treated differently in different legal systems.

Dr. Hernández asked whether the report could be shared with the General Assembly. He also requested further particulars as to what the legal advisors had wanted the Committee to study. In response, Dr. Toro explained that the representative from Mexico had asked for a study on the implication of national legislation regarding the law of the sea and had noted that few States have laws in this field, specifically on aspects of marine waste or ocean activities and that this was where the Committee could offer a practical guide.

Dr. Hollis said he is pleased to have a list and work plan and was willing to work on two topics of particular interest– cyber security and interinstitutional agreements. He noted that he had experience in the topic of agreements and how a State decides to choose a binding vs. a non-binding instrument but with legal effects. He regarded the matter of how a State chooses at the domestic level to organize that power to be a separate matter and gave the example of Colombia, where all such agreements must receive approval by Congress.

Dr. Correa offered to take on the additional topic of validity of foreign judicial decisions, as Rapporteur, to be added to the agenda of the Committee.

As a result of the exchange, it was agreed to structure the list of topics as follows: 1) assigned topics and 2) other topics; the first group would include the name of a person in charge (though not all topics would require a rapporteur) and the anticipated date of delivery, taking into account the need for flexibility. It was also agreed that the work plan/list would be shared with the General Assembly and no longer be part of the Committee's agenda, despite the decision to keep the issue open for discussion.

The report submitted by Dr. Ruth Correa Palacio is included below.

CJI/doc.531/17

REFLECTIONS ON THE WORK OF THE INTER-AMERICAN JURIDICAL COMMITTEE: A COMPILATION OF THEMES OF INTEREST

(Presented by Dr. Ruth Stella Correa Palacio)

For the purpose of enhancing the efficacy of the work of the Inter-American Juridical Committee, above all based on the concept of utility for the Member States of the OAS, the direct beneficiaries of this Committee's services, during the 86th Regular Session held in Rio de Janeiro in March 2015 it was decided to prepare an agenda of themes with a view to organizing the work of the Committee in the mid-term based on criteria of necessity and utility.

To this end it was agreed to engage in different activities such as: i) investigate the concerns of the juridical consultants of the various Ministries of Foreign Affairs to determine the specific needs of the States in matters common to them and related to international public and private law; ii) listen to academic organizations dedicated to the study of international law; iii) gather from the Committee members those topics on which they feel the Committee should concentrate.

The Rapporteur of the theme presented a first report at the 87th regular session held in Rio de Janeiro in August 2015, in which she suggested a list of themes meant for the analysis and consideration of the Committee in order to compose a mid-term agenda to be worked in an articulated fashion.

This agenda was complemented by those issues suggested by other members of the Committee. Likewise, based on the fact that these had been discussed on previous occasions or else duplicated work carried out by other branches of the Inter-American System of Human Rights, some themes presented by the Rapporteur were laid aside, namely: Rights of Indigenous

Peoples, Government Procurement, Establishing an Inter-American Court of Justice, as well as procedural topics related to the activity of this Court.

At the 88th Regular Session held in Washington in April 2016, a meeting held with university professors specialized in international private law produced various themes for study. At the same session, the General Secretary of the OAS forwarded several topics for the Committee to research.

At the 89th Regular Session held in Rio de Janeiro on 3-14 October 2016, the conclusions reached at the meeting held with the juridical consultants of Ministries of Foreign Affairs considerably enhance the list that exists today. Furthermore, the members of the Committee proposed that the lengthy list of available proposals should lend priority to the following criteria:

- A classification of the topic according to the area and taking into consideration the type of right they refer to.
- The need for a balance between topics involving public and private international law.
- An accurate formulation of the topics.
- Taking into consideration its practical usefulness.
- Taking into account the expertise of the members of the Committee.
- Avoid duplication of work *vis-à-vis* activities carried out in other fora.
- The work done has to provide added value.
- The availability of human and financial resources necessary to carry out the work must also be taken into account.

In short, the list of topics contained in this document is the result of the initiative of the Committee members, of the mandates of the General Assembly for the Committee, and also of the proposals provided by the legal counsels of the Ministries of Foreign Affairs. The list is therefore available for the Committee to define the topics to be addressed in the mid-term and the order in which they will be considered, without jeopardizing the possibility of adding them upon request of any members or of the General Assembly.

After each topic, its origin is identified between brackets. In the absence of brackets it should be understood that the topic was offered by the Committee.

Topics on International Public Law

1. Guide for the enforcement of the Principle of Conventionality. Harmonization of internal Constitutions and the convention.
2. Immunity of Jurisdiction. Practical guide for the enforcement of immunity of jurisdiction in relation to the States and with International Organizations, especially in topics such as notices, enforcement of condemnations, and alternative mechanisms allowing the filing of claims in independent fora. Presumption in favor of the principle of immunity (legal counsels).
3. Protection of cultural heritage and patrimonial assets.
4. Juridical relations between the American Convention on Human Rights and legal persons.
5. Environmental topics.
6. Rights of minorities – Gender perspective in research and judgement.
7. Guide for a model law on the principle of legality in administrative proceedings.
8. Responsibility of States vis-à-vis the Inter-American system in the case of constitutional amendments (pension rights, due process, job security, etc.)
9. Deprivation of freedom. Precautionary arrest, reasons for same. Responsibility of the State in the case of arrest.
10. Right to rebuttal of citizens.

11. Conscious and effective regulation of companies in the area of human rights (mandate of the GA).
12. Protection of the marine environment.
13. Principles on conflicts of law in trans-border topics (to determine the precedence of applicable regulations). (round table 4.04.16 DIP)
14. Dissemination of information and review/revision of existing instruments, similar to the Hague conference. (round table 4.04.16 DIP)

Private International Law

- Trade customs and practices. (round table 4.04.16 DIP)
- Electronic commerce and protection of consumers. (round table 4.04.16 DIP)
- Electronic payments. (round table 4.04.16 DIP)
- Explanation on the operation of the existing conventions through the website (Inter-American Convention on Letters Requisitorial and Letters Rogatory, for example). (round table 4.04.16 DIP)
- Checking the existing instruments approved by the CIDIP for the purpose of reviewing its pertinence, maintenance, elimination or replacement. (round table 4.04.16 DIP)
- Simplified-stock companies. (round table 4.04.16 DIP) (Legal counsels)
- Studies in the area of resolution of online disputes taking into consideration the UNCITRAL principles.
- Possibility of carrying out a revision seen from a Latin-American perspective involving the work of The Hague conference concerning the Draft on recognition and enforcement of foreign judgements (*Judgements Project)*. (round table 4.04.16 DIP)

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2. Guidelines on the protection of stateless persons

Document

CJI/doc.529/17	Guidelines for the protection of stateless persons: update (Presented by Dr. Carlos Mata Prates)

At the Forty-fourth Regular Session (Asuncion, Paraguay, June 2014) the General Assembly issued a new mandate and instructed the Inter-American Juridical Committee to draft, in consultation with the Member States, "a set of Guidelines on the Protection of Stateless Persons, in accordance with the existing international standards on the topic", AG/RES. 2826 (XLIV-O/14).

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Carlos Matta Prates was designated rapporteur for the topic.

At the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), the Inter-American Juridical Committee adopted the report entitled Guide on the protection of stateless persons (CJI/doc.488/15 rev.1) through resolution CJI/RES. 218 (LXXXVII-O/15).

At the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, October 2016), Dr. Mata Prates, who acted as rapporteur of the theme in the past, provided some remarks to the comments submitted to the report of the Committee on the protection of stateless persons by the United Nations High Commissioner for Refugees (UNHCR).

Dr. Mata Prates reported that after approval of the report of the Committee, the UNHCR started to analyze the document and the result of the analysis are the comments forwarded. He observed that there are two possible approaches to the theme: one academic and one practical, and that the second in particular is the approach adopted by the Committee. In this regard, almost all the references made by

the UNHCR are included in the report. However, he expressed interest in adding a chapter to the report introducing suggestions of goods practices for the States. He recalled that the conclusions adopted by the Juridical Committee establish that the existing norms are sufficient, and that they need implementation.

He also stated that the UNHCR document refers to several instruments that are not binding, but that are merely "*soft law*", citing as example the UNHCR Manual of Procedures, the declarations at the regional and universal level in the core of the Regional Agency, decisions and sentences of the Inter-American Court and decisions of the Inter-American Commission, He suggested that the Committee could add to the report some directives making reference to the UNHCR manual as well as to guiding criteria for the States, such as the decisions and rulings of the inter-American system for the promotion and protection of human rights.

It must be noted that on October 13, 2016, the Committee was visited by Drs. José Murillo and Juan Ignacio Mondelli of UNHCR, with whom the plenary held a rich exchange on the Guide to the protection of stateless persons.

In light of the aforementioned developments, Dr. Mata Prates presented a revised version of the report approved by the plenary of the Committee in the previous year, CJI/doc. 488/15 rev.2.

The Rapporteur mentioned the norms that should be incorporated to the report of the Committee while urging their ratification and implementation:

- 1954 Statute of Stateless Persons;

- 1961 Convention for the reduction of statelessness; and,

- American Convention of Human Rights (Article 25).

Should these norms be applied, the situation of stateless persons should be resolved in the existing cases, considering that these norms are sufficient enough to resolve the problem.

In addition, he addressed some aspects of the UNHCR for reducing statelessness, which could be included in a chapter of the guide addressing the orientation towards the level of "strategic framework". This may be explained because they are *lege ferenda* for indication of good practices for States.

Dr. Mata Prates noted that the UNHCR's comments are of a different nature when compared to the guide approved by the Juridical Committee, taking into account that the instrument adopted by the Committee is related to existing *lege lata* elements. Finally, he expressed appreciation for the references to the Inter-American human rights protection system, noting in this regard that it is not a matter of *lege lata*, but rather involves indicators on how States could develop protection.

The Chairman noted that in the light of the amendments to the UNHCR model law in November, it would be interesting to check how this is implemented, so that the Rapporteur may include these amendments in his report. He also stated that it is important to include the resolution of the June 2016 General Assembly in Santo Domingo, within the norms to be taken into consideration, because the resolution deals with prevention and promotional measures. Lastly, he asked to consider the judgment of the Court regarding the situation of Dominicans of Haitian descent and Advisory Opinion No. 21.

Dr. Villalta thanked the Rapporteur and asked about the facts generating the highest number of stateless in the Americas.

Dr. Stewart was also grateful to the Rapporteur, and asked about the suggestion to create a specialized organ to assist cases of statelessness. He proposed reformulating the criteria, recommending that States take concrete steps to resolve the situation of statelessness, which may or may not include setting up of a new organ.

Dr. Mata Prates thanked Dr. Stewart for his suggestion not to mention the UNHCR, in which case it may be suppressed.

As regards the comments of the Chairman, as we approach the date for the UNHCR meeting with the aim of updating its model law, there would be no inconvenience in waiting for the results of said meeting in order to include the status of the question after introducing the amendments.

Regarding a second issue, he reported that he was not in favor of adding a resolution of the General Assembly, as he was of the opinion that States are aware of its contents already.

In addition, the question of referring to one or two decisions of the Inter-American Court has the inconvenience of "freezing" the document in time and disclosing the name of the State affected that was ruled a negative decision, may place the Committee in an uncomfortable situation.

Regarding the theme mentioned by Dr. Villalta, although the reasons that explain the phenomenon of stateless persons are extremely complex, the definition given by article 25 of the American Convention of Human Rights is very precise.

The Chairman proposed the following in terms of actions regarding the topics mentioned by Committee members:

- It was agreed to pay attention to the result of the UNHCR meeting and introduce and update them when necessary;
- Include the resolution adopted by the General Assembly in Santo Domingo;
- In matters involving decisions, introduce a determination in relation to the cases addressed by the Court, both decisions as well as consultative opinions, making a distinction between penalties and responsibility of the State *vis-à-vis* the criteria issued by the Court, in order to alleviate the rapporteur´ concerns; and,
- Clarify the issue raised by Dr. Stewart regarding the setting up of a new organ.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), Dr. Mata Prates presented an update regarding the Guide on stateless persons, document CJI/doc.529/17, to incorporate the comments of the United Nations High Commissioner for Refugees (UNHCR) into the report adopted by the Committee at its 89th Regular Session (CJI/doc. 488/15 rev. 2 of October 4, 2016).

He reported that subsequent to the last meeting of the Committee in 2016, at the invitation of the UNHCR, he took part in meetings held in Quito, Ecuador, which had given rise to discussions on the "2014-2024 Draft Global Action Plan to End Statelessness," and that as a result, final revisions were made to the document on the "Draft Articles on Protection and Facilities for the Naturalization of Stateless Persons," which had been adopted in response to the mandate of the General Assembly under Resolution CJI/RES. 218 (LXXXVII-O/15) of August 7, 2015.

He explained that what was done was to prioritize what exactly determines that a person is stateless. At the normative level, ratification of the 1954 and 1961 instruments is essential. In terms of a strategic framework, there are international rules, but on the other end of the scale, there have been domestic developments that must be taken into consideration. He stressed that international instruments do not have an adequate level of ratification by OAS Member States, to be tuned into the problem of statelessness. In this context, the United Nations "Global Action Plan to End Statelessness" urges States to resolve existing situations of statelessness; prevent the emergence of new cases of statelessness; and better identify and protect stateless persons. For this purpose, a call was made to establish clear procedures that take into account the vulnerability of a stateless person and to consider creating a special entity in each country to protect the human rights of the persons involved.

Dr. Mata Prates also noted that Article 20 of the American Convention on Human Rights plays a key role in the system as a whole and was not sure why States do not fully apply this provision on the right to nationality. He noted that if everyone has the right to nationality, then no one could be deprived it. This article is crucial in terms of addressing statelessness, but there is legal precedent that does not take this into account. For this reason, he added, there is a need to enforce the article.

The Chair thanked the Dr. Mata Prates, asked the Secretariat to reflect the work in the annual report, and closed discussion on the topic.

The report submitted by doctor Carlos Mata Prates is included below.

CJI/doc.529/17

GUIDELINES FOR THE PROTECTION OF STATELESS PERSONS: UPDATE

(Presented by Dr. Carlos Mata Prates)

I. Introduction

1. Through resolution AG/RES. 2826 (XLIV-O/14) on *Prevention and reduction of statelessness and protection of stateless persons in the Americas*, the General Assembly of the Organization of American States (OAS) asked the Inter-American Juridical Committee (IAJC) to prepare *Guidelines on the Protection of Stateless Persons*.

2. The Inter-American Juridical Committee (IAJC) designated the undersigned as rapporteur for the topic and, at its 87th regular session, held at its headquarters in Rio de Janeiro between August 3 and 12, 2015, adopted through resolution CJI/RES. 218 (LXXXVII-O/15), of August 7, 2015, the report entitled *Guide on the Protection of Stateless Persons*, presented by the Rapporteur on August 6, 2015.

II. Comments by UNHCR

3. After approval of the document by the Inter-American Juridical Committee (IAJC), the regional section of the United Nations High Commissioner for Refugees (UNHCR) forwarded some comments on that IAJC document.

4. It is worth pointing out that all the inputs received from the regional section of UNHCR regarding the document have to do with particular issues of both soft law and references to judgments or advisory opinions of the Inter-American Court of Human Rights.

5. Without prejudice to the fact that all that was already included in the document and quite apart from the juridical effects of some of the decisions referred to, the IAJC agreed, after reviewing the situation with UNHCR, to mention them explicitly in the IAJC document. That agreement was implemented and the document was adopted at the 89th session of the IAJC through resolution CJI/doc.488/15 rev. 2 of October 4, 2016.

III. Participation in activities promoted by UNHCR

6. I should also like to point out that, on invitation by UNHCR, I took part in two meetings held by that body that have a direct bearing on the topic addressed in the Committee: a) "The Regional Meeting of Parliamentarians: Ending Statelessness in the Americas through Legislative Actions," held in Quito, Ecuador, on November 9, 2016; and b) the "Second Regional Meeting on Statelessness Determination Procedures and Protection of Stateless Persons," held on November 10, 2016, in Quito, Ecuador.

7. It is worth noting the importance of both meetings, which took the same approach as the General Assembly of the Organization of American States (OAS) and the work done by the Inter-American Juridical Committee.

8. Finally, I should point out that thanks to the second meeting the final touches were put to the draft entitled "Draft Articles on Protection and Facilities for the Naturalization of Stateless Persons" (attached hereto), which is in line with the Committee's document.

I remain at your disposal for any additional information or clarification.

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3. Privacy and protection of personal data

Document

CJI/doc.541/17 corr.1 Privacy and protection of personal data
(Presented by Dr. Ana Elizabeth Villalta Vizcarra)

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), Dr. Elizabeth Villalta presented a report on a topic that was not on the Committee's agenda, in view of its importance, "Report on privacy and protection of personal data," document CJI/doc. 541/17. On this occasion, she gave background information to the topic, citing the 2014 mandate of the General Assembly pertaining to the drafting of international standards and course of action taken by the Rapporteur appointed at that time, Dr. David Stewart, to address protecting the use and the dissemination of data through principles, including personal data and privacy protection. In this regard, Dr. Villalta summarizes in her report each of the principles adopted by the Committee.

She then turned to the work carried out by the Ibero-American Data Protection Network, which adopted in June 2017 general guidelines, dubbed the Ibero-American Standards, for the purpose of supporting the drafting and strengthening of the legal provisions at the domestic level through a uniform set of rules regarding the protection of personal data. She described the elements of the right to access, rectification, erasure, objection to processing and portability. She also mentioned mechanisms of international cooperation and the role of domestic legislation. Lastly, Dr. Villalta cited developments regarding the right to privacy in the Inter-American and global system. In her conclusion, Dr. Villalta urged the Committee to work to produce a model law or guidelines on personal data protection in light of recent developments in Europe and the region, in order to advance the domestic legislation of the Member States on both data protection and access to information.

Dr. João Clemente Baena Soares commended Dr. Villalta on her drive in pursuing the aforementioned topic and said it is an issue that calls for reining in *big brother,* identified as the technological power of companies as opposed to governments. The Committee, in his view, should continue its efforts realistically, regardless of any setbacks we run into as citizens, in comparison to the power wielded by companies. Accordingly, the Committee should provide States with instruments to address the situation. Release of personal data by technological action is tantamount to the demise of privacy.

Dr. Carlos Mata Prates congratulated Dr. Villalta on the report she authored, which delves deeply into a topic, which has many different aspects to it. He shared the opinion of Dr. Baena Soares, and urged continuing to work to make a contribution that effectively protects the rights of individuals. The drafting of Principles by the Committee could stand to be enriched by the Network's Standards and, therefore, work must be done to figure out what input the Committee can provide. Among the provisions highlighted by Dr. Villalta, he identified the importance of cooperation. As to the nature of the document to be drafted, he supported the drafting of a model law.

Dr. Duncan Hollis thanked Dr. Villalta for writing the report on the subject. He noted that, along with business companies, governments should also be held responsible for misuse of personal information. He also remarked that only 15 OAS Member States have regulations in place on the subject, which in and of itself can be incentive to produce a model law in order to support the States that have not advanced in this area. However, he said, these States must be held to the level of effectiveness of the Principles on privacy and personal data adopted by the Committee. Additionally, he said, we must narrow the scope of the work. If we are setting out to analyze only personal data, then it is essential to be aware of the differences in treatment of the topic between Europe and the United States.

Dr. José Moreno congratulated Dr. Villalta on a topic that requires serious treatment. He asked whether it is worthwhile to allocate resources to the subject, considering that efforts are already under way in the universal sphere and within the OECD, where a guide on the topic is available.

Dr. Juan Cevallos expressed concern over the need to strike a balance between the initiatives presented here and domestic legislation; also, in particular, the topic of exceptions to the right to privacy where public interest must be front and center.

Dr. Dante Negro cited the documentation submitted by the Committee on the subject, which includes a report on the principles and a legislative guide. This report was submitted to the CAJP and there was no decision for the Committee to deal with it, as is the case with other topics too. As to the Network, he noted that it is made up of national experts and, therefore, the positive thing about its work is that it comes from a group of individuals who address the topic in everyday life.

Dr. José Moreno asked whether the work on the Standards will be useful and will it have the effect of making regulation uniform throughout the region. He also reiterated his concern about the topic already being addressed in the universal system.

Dr. Carlos Mata Prates requested that an analysis be conducted to determine the way forward, in light of Dr. Villalta's proposal to draft a model law, bearing in mind the Legislative Guide drafted by the Committee. He noted that Dr. Villalta's tracking of the Networks developments on the topic attests to the importance attached by the Committee to the topic.

Dr. Elizabeth Villalta urged the topic to be kept on the Committee's agenda through a rapporteurship, whose precedents include the principles, the legislative guide and the standards. The way she views it, an OAS document will be more effective among the Member States than a product of the OECD.

Dr. Duncan Hollis viewed as a challenge for the Committee to plan a third way forward that does not favor one vision over others. He said that we should have a general discussion about the way forward on the topic of privacy (the right to be forgotten in Europe is not accepted in the US). The other challenge is acting on a topic that is being addressed by international organizations on the subject matter. We should not set the topic aside, but nor should we decide today about the work to be undertaken by a rapporteurship.

The Chairman noted that discussion on the topic was closed with the approval of the legislative guide, without prejudice to any participation and collaboration by members of the network that can be done on the Committee. Additionally, he regarded treatment of this topic as important, though the Committee should not be duplicating efforts. In this context, he views as essential determining whether any work should be done on the subject (which in any case should not be anything less than a model law), and whether there is any interest of any member. In this regard, he asked the Department of International Law to do a comparative study between the Committee's Legislative Guide and the Ibero-American Network Standards and, to the extent possible, provide comments to figure out whether there is a need to move forward on this.

Dr. Dante Negro took note of the mandate and expressed availability to do the study requested, and suggested at the same time that at the next session the Committee engage in discussion on the content thereof, in view of the different criteria existing in the region as to how to approach personal data.

The report submitted by Dr. Elizabeth Villalta is included below.

CJI/doc.541/17 corr.1

PRIVACY AND PROTECTION OF PERSONAL DATA

(Presented by Dr. Ana Elizabeth Villalta Vizcarra)

I MANDATE

The Inter-American Juridical Committee (CJI) chose the undersigned to represent it in various meetings of the Ibero-American Data Protection Network (RIPD) during which the

participants discussed the protection of personal data and went on to develop Standards for Personal Data Protection to promote the adoption of uniform rules across the region.

In that connection, I hereby submit the following report to the Inter-American Juridical Committee at its 91st Regular Session, to be held in Rio de Janeiro, Brazil, from August 7 to 16, 2017.

II. BACKGROUND

The Inter-American Juridical Committee (CJI) proposed a set of principles on privacy and personal data protection in the Americas aimed at encouraging OAS Member States to institute measures ensuring respect for people's privacy, reputations, and dignity and, in particular, to consider formulating and enacting legislation to protect the personal information and privacy interests of individuals.

At its forty-fourth regular session (Asunción, Paraguay, June 2014), the OAS General Assembly instructed the Inter-American Juridical Committee "to prepare proposals for the [Committee on Juridical and Political Affairs] on the different ways in which the protection of personal data can be regulated, including a model law on personal data protection, taking into account international standards in that area" AG/RES. 2842 (XLIV-O/14).

The CJI rapporteur for this topic concluded that the most effective approach would be to develop a legislative guide based on the 12 principles adopted by the Committee, with a few changes taking account of the various sets of guidance prepared within the European Union, the OECD, APEC, etc., and providing additional guidance to states. The purpose of the guide would be to assist Member States in the preparation of national legislation, drawing on the achievements in other regions while taking into account developments in our own region and technological advances.

These principles are based on internationally recognized standards. They are intended to protect individuals from wrongful collection, use, retention, and disclosure of personal data. National rules for the protection of personal data must have a legitimate purpose and ensure that the data is processed in a fair, legal, and nondiscriminatory manner. They must ensure that those who collect, process, use, and disseminate personal data do so appropriately and with due regard for the rights of the individual.

Member States must seek a balance between the right to access data and the right to the protection of personal data. In other words, they must balance the right of individuals to control how their personal data is collected, stored, and used against the right of individuals and organizations to use personal data for reasonable and legitimate business purposes in a secure and protected manner.

The principles on personal data protection apply equally to the public and private sectors—that is, to personal data generated, collected, or administered by either government or private entities. They do not apply to personal data used by an individual exclusively in the context of his or her private life.

The concept of privacy rests on the fundamental rights of honor, dignity, intimacy, and image as well as freedom of speech, thought, opinion, and association. Many of these rights are recognized in the international human rights instruments and the constitutions and fundamental laws of the OAS Member States.

Within the Inter-American system, these rights are clearly established in Article V of the American Declaration of the Rights and Duties of Man (April 30, 1948) as well as Articles 11 and 13 of the American Convention on Human Rights ("Pact of San José") (November 22, 1969). The Inter-American Court of Human Rights has also cited them in various judgments, including *Case of the Ituango Massacres v. Colombia* and *Case of Atala Riffo and daughters v. Chile*.

With respect to national secondary legislation, a number of OAS Member States have adopted rules guaranteeing respect and protection for privacy and personal data.

At the same time, most of these laws establish that the right to privacy is not absolute and may have reasonable limitations. Similarly, the fundamental principles of freedom of expression and association and free flow of information are also recognized in the international human rights

instruments. Within the Inter-American system, they are guaranteed under Article IV of the American Declaration of the Rights and Duties of Man (April 30, 1948) and Article 13 of the American Convention on Human Rights, ("Pact of San José") (November 22, 1969).

"Personal data" is any information specific to an individual that can be used to identify that individual. It is information that identifies or can reasonably be used to identify an individual, whether directly or indirectly. It is information about an identified or identifiable individual such as his or her name, email address, marital status, occupation, or identification number.

"Sensitive personal data" is data whose disclosure would affect the most intimate aspects of a person's life or place him or her at serious risk. This category includes, for example, racial or ethnic origin; present and future state of health; genetic information; religious, philosophical, or moral beliefs; union membership; political opinions; and sexual preference or orientation.

The "data controller" is the natural or legal person, private entity, public authority, or other body or organization which, alone or jointly with others, is responsible for storing, processing, using, protecting, and disseminating the data. In some circumstances, it is also responsible for collecting the data.

The "data processor" is the natural or legal person, private entity, public authority, or other body or organization that processes the data in question, alone or jointly with others. "Data processing" includes any operation or set of operations performed on personal data, such as collection, recording, storage, retrieval, disclosure, or transfer.

The "data protection authority" is the body responsible for setting and enforcing the laws, regulations, and requirements relating to the protection of personal data in order to ensure consistency. Data protection authorities may differ from one member state to another, depending on the state's legislation.

The "data subject" is the individual whose personal data is being collected, processed, stored, used, or disseminated; in other words, the individual whom the personal data is about.

The principles on privacy and personal data protection presented by the Inter-American Juridical Committee rapporteur are briefly explained below:

OAS Principles on Privacy and Personal Data Protection

First Principle: Lawful and Fair Purposes

"Personal data should be collected only for lawful purposes and by fair and lawful means."

This principle must be respected throughout the process of gathering, compiling, storing, using, disclosing, and disposing of personal data.

The requirement of lawfulness embraces the notion of legitimacy and excludes the arbitrary and capricious collection of personal data. It implies transparency and a legal structure that is accessible to the person whose data is being collected. The purposes for which the data is collected must be stated clearly so that the individual is able to understand how the data will be collected, used, or disclosed.

Use of fair and lawful means excludes obtaining personal data by fraud or deception or under false pretenses. Collection must be consistent with not only the applicable legal requirements, but also the reasonable expectations of individuals based on their relationship with the data controller collecting the data and the notice(s) provided to individuals at the time their data is collected.

Second Principle: Clarity and Consent

"The purposes for which personal data is collected should be specified at the time the data is collected. As a general rule, personal data should only be collected with the consent of the individual concerned."

This principle is based on transparency and consent. This means that the purposes for which personal data is collected should be specified clearly at the time the data is collected. In addition, individuals should be informed about the practices and policies of the entities or persons collecting the personal data so they can make an informed decision about providing that data.

The individual will thus be able to consent freely to the collection of personal data in the manner and for the purposes intended. The individual's consent should be based on clear and sufficient information; it should leave no doubt or ambiguity. For consent to be valid, the individual should have adequate information about the specific details of the data to be collected, how it is to be collected, the purposes of the processing, and any disclosures that may be made. The individual must have the ability to exercise a real choice.

There must be no risk of deception, intimidation, coercion, or negative consequences for an individual who refuses to consent. The data subject's consent to the processing of his or her personal data must be freely given, specific, and informed.

Third Principle: Relevant and Necessary

"The data should be accurate, relevant, and necessary to the stated purposes for which it is collected."

Personal data should be correct, accurate, complete, and as up to date as necessary for the purposes for which it was collected. Data quality is important to the protection of privacy interests. The data collector or processor should therefore adopt mechanisms to ensure that personal data is correct, accurate, complete, and up to date.

The data must be relevant, that is, reasonably related to the purposes for which it was collected. It should not be used for unrelated purposes.

Fourth Principle: Limited Use and Retention

"Personal data should be kept and used only in a lawful manner not incompatible with the purpose(s) for which it was collected. It should not be kept for longer than necessary for that purpose or purposes and in accordance with relevant domestic law."

Personal data should not be used for purposes incompatible with those for which it was collected, except with the consent of the data subject or by the authority of law.

Personal data should be kept only as long as required by the purpose for which it was collected and as prescribed by relevant domestic law, since unnecessary and excessive retention of personal data clearly has privacy implications. Therefore, data must be disposed of when it is no longer needed for its original purpose or as otherwise required by national law.

However, in some instances (patient, employee, and student records, for example), a data controller may have legitimate reasons to retain data for a certain period of time.

Fifth Principle: Duty of Confidentiality

"Personal data should not be disclosed, made available, or used for purposes other than those for which it was collected, except with the knowledge or consent of the concerned individual or under the authority of law."

The data controller has a basic duty to maintain the confidentiality of personal data in a safe and controlled environment and to ensure that such data is not used for purposes which are incompatible with the original purpose. Protecting privacy means not only keeping personal data secure, but also allowing this data to be used and disclosed for other purposes. Trust must be established and maintained between data subject and data controller.

Sixth Principle: Protection and Security

"Personal data should be protected by reasonable and appropriate security safeguards against unauthorized access, loss, destruction, use, modification, or disclosure."

Data controllers have a duty to take necessary practical and technical steps to protect personal data in their possession or custody and to ensure that such personal data is not accessed, lost, destroyed, used, modified, or disclosed.

Personal data should be protected by safeguards that are reasonably designed to prevent material harm to individuals from the unauthorized access to or loss or destruction of the data. Sensitive personal data requires a higher level of protection.

These safeguards must be "reasonable and adequate" against cyber threats and respond to their evolution. The challenge is to provide meaningful guidance to data controllers while ensuring

that the standards remain technologically neutral and are not rendered obsolete by rapid changes in technology.

In the event of personal data breaches, data controllers should have a legal obligation to notify the individuals whose data has been compromised so that they can take stronger protective measures and obtain access and seek correction of any inaccurate data or misuse resulting from the breaches. They should also review their data retention policies and improve their security practices. For example, data controllers might be required to cooperate with criminal law enforcement agencies and other authorities.

Data controllers should be subject to penalties proportionate to the harm or risk incurred for noncompliance with the duty to safeguard and protect data. All of this should be provided for in national law.

Seventh Principle: Accuracy of Data

"Personal data should be kept accurate and up to date to the extent necessary for the purposes of use."

When personal data is collected and retained for continuing use, the data controller has an obligation to take steps to ensure that the data remains as up to date, complete, and accurate as necessary for the purposes for which it was collected and is being used, so that the rights of the data subject are not impaired.

Eighth Principle: Access and Correction

"Reasonable methods should be available to permit individuals whose personal data has been collected to seek access to that data and to request that the data controller amend, correct, or delete that data. If such access or correction needs to be restricted, the specific grounds for any such restrictions should be specified in accordance with domestic law."

Data subjects must have the right to access the data, so that they may challenge its accuracy. They must also be able to ask the data controller to amend, revise, correct, or delete the data in question, thereby exercising their right of rectification.

These rights of access and rectification are among the most important safeguards in the field of privacy protection. The right of access to personal data held by a data controller should be simple to exercise, although it may sometimes be subject to exceptions and limitations. If an individual's request for access is denied, the individual must receive an explanation of the reasons for the denial so that denials do not become arbitrary.

The national legal systems of some OAS Member States recognize a right of *habeas data*, by virtue of which data subjects may file a judicial proceeding to prevent or terminate an alleged abuse of their personal data. The specifics of this right vary from state to state. In some it is even a constitutional right.

Ninth Principle: Sensitive Personal Data

"Some types of personal data, given its sensitivity in particular contexts, are especially likely to cause material harm to individuals if misused. Data controllers should adopt privacy and security measures that are commensurate with the sensitivity of the data and its capacity to harm individual data subjects."

The term "sensitive personal data" refers to data affecting the most intimate aspects of individuals. Depending on the specific cultural, social, and political context, it might include data related to an individual's personal health, sexual preferences, religious beliefs, political ideology, or racial or ethnic origins, sex, etc.

Improper processing or disclosure of such data would intrude deeply upon the personal dignity and honor of the individual concerned and could trigger unlawful or arbitrary discrimination or result in risk of serious harm to the individual. The nature of the sensitivity may vary from country to country.

Data controllers should be able to assess the greatest risks to data subjects if data is disclosed and should therefore be held accountable for the disclosure of sensitive data.

Tenth Principle: Accountability

"Data controllers should adopt and implement appropriate procedures to demonstrate their accountability for compliance with these principles."

The effective protection of rights of privacy and data protection rests on responsible conduct by the data controllers in both the public and private sectors. Privacy protection schemes must reflect an appropriate balance between government regulation and effective implementation by those with direct responsibility for the collection, use, retention, and dissemination of personal data.

Proper application of this set of principles depends on the ability of those who collect, process, and retain personal data to make responsible, ethical, and disciplined decisions about that data and its use throughout the data's lifecycle. These data managers must act as good stewards of the data provided or entrusted to them.

Data controllers should ensure that employees who handle personal data are appropriately trained about the purposes and procedures for the protection of that data through effective privacy management training programs.

Eleventh Principle: Transborder Flow of Data and Accountability

"Member States should cooperate with one another in developing mechanisms and procedures to ensure that data controllers operating in more than one jurisdiction can be effectively held accountable for their adherence to these principles."

In the modern world of rapid data flows and cross-border commerce, personal data is increasingly likely to be transferred across national boundaries. However, the rules and regulations in various national jurisdictions today differ in substance and procedure. In consequence, the possibility exists for confusion, conflict, and contradictions.

The central challenge for effective data protection policy and practice is to reconcile (i) the differences in national approaches to privacy protection with the modern realities of global data flow; (ii) the rights of individuals to access data in a transnational context; and (iii) the fundamental fact that data and data processing drive development and innovation. Any international data protection instrument should strive to achieve the proper balance between these goals.

Cross-border transfers should be permitted when data controllers take appropriate measures to ensure that transferred data is effectively protected in accordance with all of the principles. Member States should take the necessary measures to ensure that data controllers are held accountable for providing such protection.

Member States should work towards mutual recognition of accountability rules and practices, in order to avoid and resolve conflicts. They should promote the cross-border transfer of data (subject to appropriate safeguards), and they should not impose burdens that limit the free flow of information or economic activity between jurisdictions.

Data controllers must take reasonable measures to ensure personal data is effectively protected in accordance with these principles, whether the data is transferred to third parties domestically or across international boundaries.

Twelfth Principle: Disclosing Exceptions

"When national authorities make exceptions to these principles for reasons relating to national sovereignty, internal or external security, the fight against criminality, regulatory compliance, or other public order policies, they should make those exceptions known to the public."

Given the increasing importance of protecting privacy, Member States should provide individuals with the basic rights needed to safeguard their interests by adhering to all of the principles on privacy and personal data protection. However, in some situations, they may be required to make exceptions for reasons related to overriding concerns of national security and public safety, the administration of justice, regulatory compliance, etc. Such exceptions should be the exception, not the rule.

III. IBERO-AMERICAN DATA PROTECTION NETWORK (RIPD)

The Ibero-American Data Protection Network (RIPD) is a product of the June 2003 Ibero-American Meeting on Data Protection in La Antigua, Guatemala. The CJI and the OAS Department of International Law have participated in a number of its meetings, including the meetings in Cartagena de Indias, Colombia, and La Antigua; Guatemala. At one of the most important of these meetings, the November 2016 seminar in Montevideo, Uruguay, the preliminary draft of the Ibero-American Standards was presented to the RIPD for comments and observations (development of the Standards had been agreed at the June 2016 meeting in Santa Marta, Colombia). The Standards were revised from the technical standpoint and finalized during the May 2017 RIPD workshop in Cartagena de Indias. They were approved by unanimous vote and formally proclaimed in open session at the June 2017 Ibero-American Meeting on Data Protection in Santiago, Chile.

These Standards give the region an essential tool with which to establish a set of common data protection principles and rights that the states can adopt and develop in their national laws. The resulting uniform rules will ensure effective exercise and protection of the right to the protection of personal data and facilitate personal data flows in the region and beyond, thereby strengthening economic and social growth and encouraging international cooperation in this connection among supervisory authorities in and outside the region, as well as international authorities and organizations.

The Standards can be summarized as follows:

The preamble notes that, in a number of states in the region, the protection of personal data is a fundamental right recognized in the constitution, in the form of *habeas data* (right to personal data protection) provisions, and even has a body of case law. The lack of harmonization in this area (not all states have legislation) makes it difficult to meet new challenges for the protection of this right created by constant, rapid technological progress and globalization in various fields. We need regulatory instruments that protect personal data, including the free flow of such data among states in the region, and a harmonized legal framework that provides adequate protection, with uniform rules that give all data subjects the same protection guarantees.

As stated in the General Provisions, the purpose of the Standards is to establish a set of personal data protection principles and rights that the states can adopt and develop in their national legislation, thereby guaranteeing appropriate processing of personal data, facilitating personal data flow among the states and beyond their borders, promoting regional social and economic growth, and encouraging international cooperation in this connection among supervisory authorities in and outside the region as well as with international authorities and entities.

The Standards define a series of terms to facilitate comprehension. Their subjective scope is private natural or legal persons and public authorities or bodies processing personal data in the course of their activities and functions. Their objective scope is personal data found on partially and/or fully automated physical media, regardless of the form or method of data generation or the type of media, processing, storage, or organization. Their territorial scope is the processing of personal data by controllers or processors established primarily within the territory of the states of the region or, when not established in this territory, as provided in the Standards.

The Standards also address general exceptions to the right to the protection of personal data. Limitations are permitted for reasons of national security, public security, public health, protection of the rights and freedoms of third parties, and public interest.

A very important provision involves the processing of sensitive personal data. Data controllers may process this data only when strictly necessary for the discharge of the powers and duties expressly established in the norms governing their activities; when complying with a legal mandate; when they have obtained the express, written consent of the data subject; or by reason of national security, public security, public order, public health, or protection of the rights and freedoms of third parties.

The Standards also spell out the principles of personal data protection—legitimacy, lawfulness, fairness, transparency, purpose, proportionality, quality, accountability, security, and confidentiality—and discuss each one.

In addition, the Standards discuss the rights of data subjects, which are the rights of access, the right of rectification, the right to erasure, the right to object to processing, and the right of portability. Under the right of access, data subjects are entitled to request access their own personal data in a data controller's possession and to be fully informed of the general and specific terms of its processing. Under the right of rectification, data subjects are entitled to require a controller to rectify their personal data when it is inaccurate, incomplete, or out of date.

Data subjects also have the right to request erasure or removal of their personal data from a controller's archives, records, files, and systems, so that it is no longer held or processed by the controller. Data subjects may also object to the processing of their personal data on grounds relating to their particular situation or when the purpose of processing their personal data is direct marketing, including creating profiles, to the extent that such activity is involved. This is known as the right to object to processing. Lastly, the right of portability of personal data means that, when personal data is processed electronically or by automated means, data subjects have the right to obtain and, if necessary, transfer to another controller a copy of any personal data they have provided to a controller or that is subject to processing. The copy must be provided in a structured, commonly used and machine-readable form that ensures continued usability.

The right of access (*derecho de acceso*) is the right of any individual to request and obtain, free of charge, a report showing his or her personal data subject to processing, its source (how it was obtained), and with whom it has been shared.

The right of rectification (*derecho de rectificación*) is the individual's right to rectify any inaccurate or incomplete personal data. It means that the authorities involved have a duty to maintain up-to-date files.

The right to erasure (*derecho de cancelación*) is the individual's right to erasure of his or her inaccurate or excessive data. The data is blocked and may only be accessed by the authorities, who will erase it unless there are legitimate reasons not to.

The right to object to processing (*derecho de oposición*) is the individual's right to not to have his or her personal data processed where there are legitimate grounds.

The right of portability (*derecho de portabilidad*) allows data holders to request a copy of personal data they have provided to the controller or that is subject to processing.

These rights of access, rectification, erasure, and objection, sometimes referred to [by their Spanish acronym] as ARCO rights, are well defined in the Standards, as is the right of portability.

The Standards also discuss the data processor and its activities, as well as all aspects of international transfers of personal data. International transfers of categories of personal data may be expressly limited by the national legislation of the region's states for reasons of national security, public security, public health, or public interest or to protect the rights and liberties of third parties.

With respect to the supervisory authorities, the Standards require each State to have one or more fully autonomous supervisory authority for personal data protection, as established by its national legislation. These authorities may be single- or multiple-person bodies. They must exercise their powers impartially and independently and be free from all direct or indirect outside influences. They may not solicit orders or instructions of any kind.

These Standards also address complaints, penalties, and the associated right to compensation of data subjects who have been harmed by a violation of their right to the protection of personal data.

In addition, the Standards encourage states to establish international cooperation mechanisms for strengthening international judicial assistance between states, as well as mechanisms for promoting and exchanging best practices and experiences in the field of personal data protection, including with regard to jurisdictional conflicts with third countries.

IV. RELEVANT INTERNATIONAL LEGISLATION

Within the international human rights system, the right to privacy is protected by the American Declaration of the Rights and Duties of Man (April 30, 1948). Article V of the

Declaration reads: “Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.”

Article IX of the Declaration establishes “[t]hat every person has the right to the inviolability of his home.”

And Article X States “[t]hat every person has the right to the inviolability and transmission of his correspondence.”

Article 11 of the American Convention on Human Rights (“Pact of San José”) (November 22, 1969) provides as follows:

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

Within the universal framework, the right to privacy is governed by Article 12 of the Universal Declaration of Human Rights (December 10, 1948), which reads as follows:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 18 of the Declaration provides as follows:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19 establishes the following:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20 of the Declaration reads as follows:

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

This right is also guaranteed in Article 17 of the International Covenant on Civil and Political Rights (1966), which reads as follows:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18 of the Covenant provides as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19 reads as follows:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   a) For respect of the rights or reputations of others;

   b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The Charter of Fundamental Rights of the European Union (2000) addresses the right to privacy in its Articles 1, 7,8, 10, 11, and 12, which read as follows:

Article 1. "Human dignity is inviolable. It must be respected and protected."

Article 7. "Everyone has the right to respect for his or her private and family life, home and communications."

Article 8.

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 10.

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11.

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12.

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

The Charter of Fundamental Rights of the European Union therefore makes a distinction among all of these rights

With respect to the right to the free flow of information, in the Inter-American system it is established in Article IV of the American Declaration of the Rights and Duties of Man (April 30, 1948), as follows:

"Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

The American Convention on Human Rights (November 22, 1969) addresses this right in its Article 13, which provides as follows:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure (a) respect for the rights or reputations of others or (b) the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

At the universal level, Article 19 of the Universal Declaration of Human Rights (December 10, 1948, provides as follows:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) establishes the following:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14 of the American Convention on Human Rights ("Pact of San José) (November 22, 1969) establishes the right of rectification or reply, as follows:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company shall have a person responsible who is not protected by immunities or special privileges.

V. CONCLUSION

The Inter-American system should have a model law on the protection of personal data that would give the states in the region that do not have data protection legislation a tool box of provisions to incorporate in their domestic legislation. For the region to have uniform rules, we need a set of common principles and rights that the states of the Americas can adopt and develop in their individual legal systems.

In modern society, information and knowledge technologies are increasingly vital to every aspect of daily life, and globalization has a similar impact. In recent years, states have emphasized the right to access public information in order to make the handling of public information more transparent. Today, countries have freedom of information laws, which are unquestionably necessary for citizens to exercise their right to take part in public affairs and for the authorities to fulfil their obligation of accountability in governance. They are also ideal tools for preventing, detecting, penalizing, and rooting out corruption. For these reasons, they strengthen democracy and the rule of law and foster a culture of transparency.

However, this right to access public information must be balanced by the right to the protection of personal data and privacy. While there should indeed be a right to access information, the law should also recognize a right to privacy and the protection of personal data.

Yet not all countries in the Americas have data protection laws or recognize the right of *habeas data*, which is necessary for the protection of fundamental human rights.

This is why the region needs a regionally appropriate model law on personal data protection that countries lacking domestic data protection legislation could adopt.

The model law could be based on the data protection laws of other countries in the region, including Mexico, Uruguay, Argentina, Colombia, Peru, and Nicaragua, or on the Standards for Protection of Personal Data recently approved by the Ibero-American Data Protection Network (RIPD) and unanimously adopted at the 15th Ibero-American Meeting on Data Protection (20 to 22 June, 2017, Santiago, Chile). These Standards are also based on Ibero-American data protection laws.

We need to seek a balance between the right to access information and the right to the protection of personal data. In other words, we must balance the right of individuals to control how their personal data is collected, stored, and used against their right to access data and the right of individuals and organizations to use personal data for reasonable and legitimate business purposes in a secure and protected manner.

Thus, with a law on protection of personal data, we would achieve an equitable pairing: a law on access to public information alongside a law on protection of personal data.

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CHAPTER III

OTHER ACTIVITIES

Activities carried out by the Inter-American Juridical Committee during 2017

A. Presentations of Members of the Committee in other fora

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), Committee members described their participation in various events.

1. Report by Dr. Elizabeth Villalta about the Ibero-American Network on Data Protection, held in Montevideo, on November, 2016

Dr. Villalta participated in the meeting of the Ibero-American Network held in Montevideo on behalf of the Committee in November 2016, where advancements came to light in the area of personal data protection in several States. Dr. Villalta explained that Mexico had developed principles, which could potentially replace the Madrid Principles and that they could serve as a basis for a legislative framework or model law. She also said that it would be important to determine what authority would be in charge and that this situation was similar to the topic of access to information, where it had been found that not all countries followed the same procedures. By way of example, she explained that the European Union follows a different procedure that only provides protection to those who so request it. She said that a company in El Salvador sold personal data to its clients. She suggested that a clause be included requiring authorization to be requested from an individual to be able to make such information available to third parties.

She explained that the Ibero-American Network had been chartered by the 2003 Ibero-American Summit, and was supposed to be regarded as an intergovernmental assembly, as opposed to a meeting of experts, made up of 22 States, and was intended to eventually include Canada and United States.

2. Report by Dr. Carlos Mata Prates on the Regional Meeting of Parliamentarians: Eradicating Statelessness in the Americas through Legislative Actions, held in Quito, Ecuador, in November 2016

Dr. Mata Prates explained that the invitation to this Regional Meeting of Parliamentarians had been at the behest of the United Nations Office of the High Commissioner for Refugees and the Government of Ecuador. On the first day, a Regional Meeting of Parliamentarians was held, bringing together different countries eager to delve deeper into statelessness and to promote enforcement of legislation. More than simply an exchange, it involved a presentation of the catalogue of instruments, including the CJI document, on the subject. On the second day, the topic of protection of stateless persons was addressed by specialists from several countries, including representatives of Ministries of Justice, Foreign Affairs, Immigration, who shed light on best practices in the field. The main goal was to promote ratification of the relevant instruments by the countries of Latin America. The experiences and practices were helpful to Dr. Mata to update the report that had been approved by the Committee the year before.

During the 91st Regular Session of the Inter-American Juridical Committee, the Chairman of the Committee, Dr. Hernán Salinas Burgos, described his participation within the OAS as well as outside the Organization.

3. Report of the Chairman of the Inter-American Juridical Committee on his participation at the OAS General Assembly, the Permanent Council, and the Committee for Juridical and Political Affairs

In April, the Chairman took part in a meeting of the Permanent Council and of the Committee on Juridical and Political Affairs and, in this regard, deemed it a positive engagement with the representatives of the States at the political forums of the Organization. In his message, he highlighted the importance of dialogue with the different political bodies, and feedback that is expected from the

States to be able to follow through on the work that they themselves proposed for the Committee to carry out. He encouraged greater participation of the Caribbean in order to integrate the Common Law system perspective and the need for the States of that region to engage on the Committee.

He also cited the remarks of the Permanent Representatives to the OAS at the Committee on Juridical and Political Affairs, who requested further explanation about the meeting with the legal advisors, treatment of the topic of representative democracy, and the International Law Course.

As respects the General Assembly, the Chairman mentioned similar messages to those presented at the bodies mentioned above, noting that no new comments were made.

All reports submitted by doctor Hernán Salinas Burgos are enclosed. Observations of Member States at the CAJP session appear in a minute prepared by the Department of International Law, document DDI/doc.8/17.

CJI/doc.538/17

REPORT OF THE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE OAS GENERAL ASSEMBLY

(Presented by Dr. Hernán Salinas Burgos)

We are grateful for this opportunity to report on the work and initiatives undertaken in the last year and to offer some reflections on the vision of the Inter-American Juridical Committee (CJI) regarding its role and contribution as an advisory body of the OAS.

I. Mandates

At the outset, we wish to draw attention to the CJI's expeditious response to two General Assembly mandates: one on conscious and effective regulations for businesses in the area of human rights, and the other on cultural heritage assets.

In the first case, the CJI presented a compilation of best practices, legislation, and jurisprudence in this area, together with options for progress in conscious and effective regulations for businesses in the area of human rights. The report proposes "Guiding Principles on Corporate Social Responsibility," whose aim is consolidation of the progress made in the region.

Regarding the protection of cultural heritage assets, the report analyzes regional and universal legal instruments, proposes further national legislative development, and invites the States to establish cooperation mechanisms to facilitate the implementation of the existing instruments, especially the 1970 UNESCO Convention and the 1976 Convention of San Salvador. It also proposes the preparation of a "User's Guide" whose aim is the adoption of strategies for the recovery and restitution of cultural heritage assets.

In addition, in 2016, the Committee adopted two reports on mandates issued by this organ:

- In the area of public defense, the Committee proposed 10 principles and guidelines that refer, among other things, to the role of the defender in prevention, reporting, and support for victims of torture and other inhuman, cruel, and degrading treatment. It also draws attention to the importance of the independence and functional, financial, and budgetary autonomy of official public defender services, and the inclusion of such services in all jurisdictions (they should not be made available solely for the criminal jurisdiction). Lastly, the States are urged to provide cost-free official defender services, given that access to justice is a fundamental human right not exhausted at the first stage of proceedings; but rather extends to all stages of the justice process.
- As for the "Principles for Electronic Warehouse Receipts for Agricultural Products," the Committee adopted a group of Principles for the promotion and consolidation of a warehouse receipt financing system so as to promote asset-based lending for

agricultural sector modernization, given the impact of this lending on access to agricultural credit.

I wish to take this opportunity to place on record our gratitude to the OAS General Assembly for adopting a resolution that takes note of the reports on business and human rights and on cultural heritage assets and refers to the principles adopted by the Committee on public defense in the Americas and on electronic receipts for agricultural products.

We also express appreciation for the invitation to the States issued by this General Assembly to adopt those aspects "that are in their interest" of the *Model Law on the Simplified Corporation.* This model law, adopted by the Committee in 2012, proposes a form of corporation that reduces costs and facilitates formal procedures for incorporating commercial companies, especially microenterprise and small business. Simplified corporations have legal personality and are limited liability companies. The Committee considers that the incorporation of these models in the countries of the region may contribute to economic and social development.

II. Activities

For the members of the CJI, it is of paramount importance to do useful work that serves the interests of the Member States. To that end, feedback from different actors is essential for the preparation of the Committee's agenda. Indeed, in the last year, we held panel discussions with experts on private international law and a meeting with legal advisors of OAS Member States at which were presented general proposals to promote the appreciation and dissemination of the practical benefit of the Committee's work, as well as coordination with other regional and universal bodies, so as to avoid duplication of effort. Accordingly, I urge the States, especially the Member States of the Caribbean, to offer ideas on matters of interest so that we may achieve a practical, complete, and inclusive vision. For the Committee, for its work, it is of utmost importance to obtain contributions regarding the different legal systems coexisting in the region.

Lastly, in keeping with the CJI's contribution an advisory body to the OAS throughout its history, and even prior, and in the context of our objectives and functions established in the OAS Charter, I reiterate our availability and interest in continuing to provide support to the Organization in connection with "juridical matters" related to promoting the development and codification of international law and that impact and are of interest to the organs of the Organization, especially this General Assembly and the Permanent Council, as well as the Member States, in the hope that our contributions will be significant, useful, and serve their needs for the good of the OAS and the peoples of the region. Fundamental to that end is the aforesaid dialogue with and feedback from this Assembly and the other bodies of the Organization.

Our next regular session will be held at the Committee's headquarters, in Brazil, beginning on August 7, 2017.

Thank you very much.

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CJI/doc.536/17

REPORT OF THE PRESIDENT OF THE INTERAMERICAN JURIDICAL COMMITTEE TO THE PERMANENT COUNCIL (Washington, D.C., 19 April 2017)

(Presented by Dr. Hernán Salinas Burgos)

I. Antecedents and membership

Besides thanking you, Ambassador Diego Pary, as President of the Permanent Council, for allowing us to make a presentation in this branch of the OAS, I would like to express to the Representatives of the Permanent Missions of the States at the OAS friendly greetings from all the members of the Committee.

The Inter-American Juridical Committee (CJI) is one of the principal organs through which the OAS carries its objectives, serves as a consultative body of the Organization on legal matters; promotes progressive development and codification of International Law; and studies the juridical problems related to the integration and harmonization of national legislations, in particular bearing in mind a continental reality in which there exist various legal systems and traditions, continental law and common law.

II. Antecedents

This organ of the OAS has historically made contributions in various aspects of international law:

- In the field of treaties, the Committee played a stellar role as regards the Bustamante Code of Private International Law (1928) as well as in the process of the seven Specialized Conferences on Private International Law (CIDIPs). In respect to public international law, the Committee has presented draft conventions and exposed motives to draw up the following instruments: the American Convention on Human Rights (1969); the Inter-American Convention on preventing and sanctioning acts of terrorism (1971); and the Inter-American Convention on Extradition (1981). More recently, the Committee has presented projects relating to the editing of the Inter-American Democratic Charter (2001); the Inter-American Convention on Eliminating all forms of Discrimination against the Handicapped (1999); the Inter-American Convention against Corruption (1996) and the Inter-American Convention on law applicable to international contracts (1994).
- As for preparing a model legislation for the internal application of international commitments, the Committee has proposed model laws regarding trans-national bribery and illicit enrichment, and more recently regarding protection of cultural assets in case of armed conflict, protection of privacy and personal data, as well as simplified-stock companies (whose proposal was adopted in 2012, which this year shall be the object of a resolution on the part of the General Assembly).
- Among its juridical opinions, the Committee has presented both works in answer to mandates of the General Assembly, such as the opinion on the so-called Helms-Burton Law which enabled it to evaluate the protection of the rights of property of nationals, and the extraterritorial effects of the legislation of a member State, which had an even greater juridical impact.
- On its own initiative, the Committee has engaged in significant developments in various areas relating to administrating justice, combatting terrorism and defending democracy and migration in bilateral relations.

In this sense we are aware that the principles and norms of international law serve as a basis for the inter-American system and allow it to strengthen its capacities, the result of the great importance for the Committee to hold this dialogue with you because this enables us to become directly familiar with the themes of interest to the States.

On our part, we have engaged in a process of reflection aimed at establishing a middle-term working program meant to develop themes of interest and utility to the Member States and the OAS, together with guaranteeing as far as possible their approval and implementation by the political organs through various types of instruments, both conventional and model laws, guides, and so on.

Feedback from different actors has proved essential to this task. In fact, last year we held a meeting with representatives of the legal councils of some of the Member States of the OAS, meetings with the Secretary General, seminars with experts in the field of private international law, together with visits from specialists and academics who participate in the Course on International Law organized each year in Rio de Janeiro, an event to which the Committee contributes in the training and specialization of young law professionals in addition to diffusing international law and the Inter-American system.

III. Rendering of accounts of mandates of the General Assembly.

In this third item I will to present the rendering of accounts related to the two reports approved by the Committee in its more recent regular session, held in the Rio de Janeiro headquarters from 6 to 10 March 2017.

On that occasion, the Committee gave a response to the mandates of the General Assembly issued on June 2016, and requested a prompt reply. One of them referred to the conscious and effective regulation of companies in the area of human rights, and the second one of cultural assets.

In the first case, the IAJC presents a compilation of good practices, legislation and jurisprudence when addressing the topic, together with options to make progress in the conscious and effective regulation of companies from a human-rights perspective, including a proposal for "Guide of Principles on the Social Responsibility of Corporations in the Area of Human Rights and the Environment in the Americas", which was approved by the Committee in the year 2014.

As regards the protection of cultural assets, the report of the Committee analyzes the regional and global instruments, proposing a further development of the domestic legislation, and inviting Member States to adopt cooperation mechanisms to facilitate the implementation of existing instruments, especially the 1970 UNESCO Convention on the measures to be adopted to prevent and ban illicit imports, exports and transfer of ownership of cultural assets and the 1976 Convention on the defense of archaeological, historical and artistic assets of the American nations (San Salvador Convention). In addition, it proposes the drafting of a "User Guide" allowing for the implementation of conventions and soft law, including the design and strategies for the recovery and restitution of cultural assets, which are part of the identity and richness of our region.

We hope that these reports are useful for the General Assembly and we are fully available to provide the follow up necessary in each case.

Please also note that the information on this and other legal studies may be accessed in the webpage of the Juridical Committee (http://www.oas.org/es/sla/cji/default.asp). I am certain that they have been already published and distributed by the General Secretariat.

IV. Final words

I am very grateful for your attention and on behalf of my colleagues at the Committee I wish to inform you of our interest and availability in providing our contribution for the juridical development in the region, taking into consideration the interests of States and the Organization, and the existence in the Organization of States with diversified systems and juridical traditions, both of continental law and from the common law itself.

As said before, the Committee has provided a significant contribution in the area of its duties, both to the Organization and to the Member States. We intend to continue, and in order to do so the dialogue, interaction and cooperation with the other organs in the organization is of fundamental relevance, especially with the Permanent Council and the General Assembly, having as a perspective the benefit of Member States and their peoples.

Finally I wish to mention the support and professionalism received by the Committee from the Department of International Law of the Secretariat of Legal Affairs of the OAS General Secretariat.

Our next Regular Session with take place at the Committee headquarters in Brazil, as of the 7th August, 2017.

Thank you very much.

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CJI/doc.539/17

REPORT THE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE, TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS - CAJP

(Presented by Dr. Hernán Salinas Burgos)

I. Background and Membership

The Inter-American Juridical Committee (hereinafter "CJI") is one of the principal organs through which the OAS accomplishes its purposes. It serves as an advisory body of the Organization in juridical matters; promotes the progressive development and codification of international law; studies juridical problems related to integration; and promotes the uniformity among national legislation, taking special account of the different legal systems and traditions coexisting in our Hemisphere: the continental European system (civil law) and common law.

The Committee is composed of eleven jurists, nationals of Member States, elected by the General Assembly: Joel Antonio Hernández García (México), our Vice-Chairman; João Clemente Baena Soares (Brazil); Miguel Aníbal Pichardo Olivier (Dominican Republic); Ana Elizabeth Villalta Vizcarra (El Salvador); Ruth Stella Correa Palacio (Colombia), José Antonio Moreno Rodríguez (Paraguay), Duncan Holis (United States); Alix Richard (Haiti); and Juan Cevallos Alcivar (Ecuador). The last three members joined the Committee this year at the 90th regular session, held in Rio de Janeiro, last March. For my part, I am Chairman of the Committee for a two-year term, and am a Chilean national.

II. Topics and Mandates

1. New mandates

In 2016, the Inter-American Juridical Committee held two regular sessions and, on those occasions, adopted two reports on mandates established by this organ: "Principles and Guidelines on Public Defense in the Americas" (CJI/doc.509/16 rev. 2); and "Electronic Warehouse Receipts for Agricultural Products" (CJI/doc.505/16 rev. 2).

- **Principles and Guidelines on Public Defense in the Americas**

Through an initiative of the Inter-American Association of Public Defenders (AIDEF), which had originally submitted a proposal to the Committee, the plenary adopted said Principles and Guidelines, which envisage adequate protection of the right to legal defense. Access to justice is presented as a fundamental human right not limited to ensuring admission to a court but applying to the entire process. The Principles and Guidelines refer to the work of public defenders in cost-free state-provided legal assistance services and their role in prevention, reporting, and support for victims of torture and other inhuman, cruel, and degrading treatment. They also draw attention to the importance of the functional, financial and/or budgetary autonomy of official public defender services, which should not be limited to the criminal jurisdiction but should encompass legal assistance in all jurisdictions. Lastly, the States are urged to eliminate obstacles that may impair or limit access to a public defender and to provide their citizens with access to justice through cost-free state-provided legal assistance services. In fact, this Committee held a meeting with defenders of the Americas on March 16 of this year, on which occasion the General Assembly was invited to adopt the Principles and Guidelines submitted by this Committee.

- **Electronic Warehouse Receipts for Agricultural Products**

The Committee adopted a group of "Principles for Electronic Warehouse Receipts for Agricultural Products" out of concerns over the lack of access to credit in the agricultural sector. Warehousing means that producers are no longer forced to sell their products immediately upon harvest, and can delay sale until prices are more favorable. Warehouse receipt financing thus impacts access to credit, since it is a form of asset-based lending where the stored products are used as collateral, which increases lender confidence in loan recovery. This is relevant for our countries' economies owing to the impact of the agricultural sector on economic growth and development. We urge the political bodies to endorse and adopt these principles.

- **Consumer protection**

Note that, in 2016, the Committee also adopted a resolution on "International Protection of Consumers" (CJI/RES. 227 (LXXXIX-O/16), which describes the attention given to consumer protection issues at the national and international levels, and also issues a new mandate on methods for online arbitration of disputes arising from cross-border consumer transactions, given the challenges consumers face in their cross-border dealings, in particular, the need for adequate methods for settling disputes that may arise in such dealings.

- **Proposed mandates of the General Assembly**

At the session in October, we added to the agenda the two new mandates proposed by the General Assembly that met in June 2016, in Dominican Republic: "conscious and effective regulations for businesses in the area of human rights" and "cultural heritage assets," and, at the session held in March this year, the Committee addressed both matters. In fact, yesterday, I reported to the Permanent Council on those developments and most respectfully requested feedback to the Committee as to how they would be handled, expressing our availability to provide any follow-up required.

- **Agenda of the Committee**

Lastly, I report that at our most recent working session, held in March this year, we concluded our treatment of the topic of the immunity of States and reviewed new studies of immunity prepared by international organizations; law applicable to international contracts; representative democracy; a study of mechanisms to improve implementation of the Inter-American Democratic Charter; application of the principle of conventionality; and online arbitration in cross-border consumer transactions. Note that the Committee, using its authority to act on own initiative, added two new items to its agenda: one on binding and non-binding agreements, and another on the validity of foreign judicial decisions.

2. Follow-up by the States to completed mandates of the Committee

I would like to take this opportunity to express the gratitude of all my colleagues on the Committee to the Chair of the Committee on Juridical and Political Affairs, Ambassador Loten, and to the members of this Committee for allowing the Department of International Law, our Technical Secretariat, this year to briefly summarize four reports prepared earlier by the Committee, and, in particular, to thank them as well for approving the Model Law on the Simplified Corporation, whose draft resolution was approved by this Committee on March 30, for adoption by the General Assembly.

That Model Law proposes a hybrid form of corporation that reduces costs and formal procedures for incorporating microenterprises and small businesses, based on the experience of Colombia in this area. In the Committee's view, incorporation of this model law in national legislation may help promote economic and social development in the Member States. Without seeking to impose substantive obligations on the States, the draft resolution clearly invites the States to adopt "in accordance with their domestic laws and regulatory framework, those aspects of the Model Law on the Simplified Corporation that are in their interest."

III. Activities

For the members of the CJI, it is today of paramount importance to obtain the views of the political organs of the Organization, given the Committee's commitment to doing useful work that serves the interests of the Member States, as well as adequate feedback and dialogue, especially with the political organs of the OAS, which must benefit the Member States.

In that effort, and mindful of its authority to act on its own initiative, the Committee has prepared a work plan based on exchange with the States, especially those that replied to a questionnaire prepared to that end, as well as the important input afforded us by members of the Committee. On this occasion, I invite Member States of the Caribbean to provide us with further details of matters of interest so that we may achieve a fuller and more inclusive vision of our region, in which as well different legal systems and traditions coexist.

Feedback from different actors has been essential in efforts to develop new items for inclusion on the Committee's agenda. In 2016, the Committee held a working meeting at the

Permanent Council's headquarters, here in Washington, D.C. and another at CJI headquarters, in Rio de Janeiro. At our meeting in Washington, D.C., for a second consecutive year, the Committee met with the Secretary General during sessions of the Committee and followed up on matters of interest in the area of international law. The Secretary General expressed interested in matters related to the Inter-American Democratic Charter, especially Article 20 and the concept of "good governance"; legislation on political parties, protection of children from sexual abuse and violence; and matters related to cyber security for the punishment of "phishing" scams, especially those that are transnational in nature.

I take this opportunity to indicate our availability to meet away from the headquarters of the Committee in Rio de Janeiro, since the abovementioned activities enable us to be in direct contact with national authorities working in the area of international law, such as legal advisors and judges, as well as members of civil society and of the academic community. In recent years, we have held sessions in Mexico (2012), Peru (2010), Colombia (2009), and El Salvador (2007).

Meeting with legal advisors and representatives of legal advice services of Member States. I wish to recognize this initiative, held during the October 2016 session, and to thank the countries that were able to fund the attendance of their representative. A rich exchange took place on matters of interest in the areas of public and private international law, such as immunities, cyber security, international commerce, institutional agreements, and consumer law. Also presented were general proposals to promote appreciation of the practical benefit of the Committee's work. Taking part on that occasion were the legal advisor's offices of the Ministries of Foreign Affairs of Brazil, Chile, United States, Mexico, Paraguay, Peru, and Uruguay.

Panel discussions. In the last year, the Committee made efforts to encourage among its members discussion of matters of private international law and approaches to specialists in the region. To that end, panel discussions were held at its last two working sessions.

At the April 2016 session, held in Washington, D.C., the meeting discussed the future of private international law in the region and other matters were explored. The guests set out their visions of the challenges of private international law, especially the need for flexibility in new norms. As for specific matters, they proposed different items for the Juridical Committee, among them, consumer protection and trade practices and customs in private international law. Notable among participants were eminent professors and practitioners of the United States and Canada.

At the October 2016 session, held in Rio de Janeiro, the joint Committee of the American Association of Private International Law (ASADIP) and the University of the State of Rio de Janeiro (UERJ) held a meeting at the UERJ Law School to discuss three major topics: the work of the OAS in the codification and promotion of private international law; international protection of consumers; and international contracts. Presentations were given by eminent professors of Brazil and other countries, CJI members, and staff members of the Department of International Law. Participants included a hundred law students, enriching the event.

Course on International Law. The Committee, with support from the Department of International Law, from October 3 to 21, 2016, held the XLIII Course on International. Law. In attendance were 15 scholarship recipients from different countries of the Hemisphere, funded by the OAS, as well as 20 self-funding participants, both Brazilian and foreign. To be noted among panelist contributions was that of former CJI Chairman Dr. Fabián Novak Talavera, who, at the inauguration of the Course, gave a lecture on the legal developments of the Committee. Also to be mentioned was the presence of Dr. Antonio Augusto Cançado Trindade, Judge of the International Court of Justice; Dr. Antonio Herman Benjamín, Judge of the Supreme Court of Justice of Brazil; and Ambassador Luis Alfonso de Alba Góngora, Permanent Representative of Mexico to the OAS, who honored us as well by his presence at CJI headquarters.

Web page. Through the good offices of our Technical Secretariat, the Department of International Law of the Secretariat for Legal Affairs, the Committee's web page was modified to facilitate access to the items on its agenda and to the annual reports since 1994.

Therefore, I take this opportunity to thank the staff members of the Department of International Law for their ongoing support for all our tasks.

Lastly, I reiterate our availability and interest in continuing to provide support to the Organization in connection with "juridical matters" related to promoting the development and

codification of international law, as reflected in the Charter, in the hope that our contributions will be significant for the Member States and their citizens alike.

Thank you very much.

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DDI/doc.8/17

MINUTES

PRESENTATION OF THE ANNUAL REPORT TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

(Document elaborated by the Department of International Law)

On Thursday, April 20, Dr. Hernán Salinas Burgos, Chair of the Inter-American Juridical Committee (CJI) made the traditional presentation of the annual report to the Committee on Juridical and Political Affairs.

Presiding at the meeting of the CAJP was its Chair, Ambassador Jennifer Loten, Permanent Representative of Canada to the Organization of American States (OAS).

Attending the meeting were representatives and delegates of the permanent missions to the OAS of the following countries: Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and the Bolivarian Republic of Venezuela.

1. Report of the Chair

The Chair set out the agenda of the CJI, noting the inclusion of two new topics: non-binding agreements and validity of foreign decisions. He also mentioned the reorientation of the approach to the issue of consumer law, which will be addressed from the perspective of *online arbitration in cross-border consumer transactions*. In addition, he summarized the two reports adopted by the CJI in 2016: "Principles and Guidelines on Public Defense in the Americas" (CJI/doc.509/16 rev. 2) and "Electronic Warehouse Receipts for Agricultural Products" (CJI/doc.505/16 rev. 2). The former, which concerns adequate protection for the right of defense in judicial proceedings and access to justice, proposes principles and lines of action with respect to the work of defenders in the Americas. The latter report, concerning warehouse receipts, demonstrates the impact of this mechanism on access to funding for producers who can thus use warehoused products as security in obtaining loans. The Chair also thanked the members of the CAJP for the decision to submit the Model Law on the Simplified Corporation to the General Assembly, the purpose of which is to reduce the costs and formalities for establishing micro-enterprises and small businesses.

As regards the activities carried out over the previous year, Dr. Salinas mentioned the meetings with the Secretary General, seminars with experts in the area of private international law, and visits by specialists and academics to attend the Course on International Law in Rio de Janeiro, an event that, apart from providing instruction, disseminates international law and awareness of the inter-American system. In closing his presentation to the CAJP, the Chair of the CJI recognized the paramount significance of the dialogue with representatives of the Organization's political bodies and of the importance of meetings with the legal counsels of ministries of foreign affairs.

2. Comments and proposals by representatives of Member States

The Representative of Honduras to the OAS congratulated and thanked the CJI for its work. It also read out a list of the varied topics that the CJI addresses, which reflect the value and benefits of the organ, whose model laws and practices serve all citizens and even have positive ramifications for the advancement of economic issues. He thanked and acknowledged the efforts

of all OAS auxiliary bodies, particularly the Committee for its presentation of such a comprehensive report.

The delegate of Ecuador noted that the previous day her delegation had delivered a presentation in the Permanent Council in response to the two mandates that the CJI had fulfilled in accordance with resolutions adopted by the General Assembly at its regular session in June 2016. She highlighted the magnificent work that the CJI does in the development of inter-American law, which thus serves as a model for other regions.

The delegate of Mexico expressed appreciation for the work of the CJI and thanked the members (Drs. Novak, Guerra, and, Collot) who had completed their terms in office in December 2016 for their endeavors. She also welcomed those who joined the CJI in January that year: Drs. Hollis, Richard, and Cevallos. She expressed the support of her delegation for the conclusions of the Committee's report on cultural heritage assets, a subject of great importance for the Hemisphere, and in particular the call for the adoption of domestic standards and to cooperate in that regard with other states and specialized organizations. In that connection, she thanked Dr. Joel Hernández, the rapporteur on the topic, for his work. As regards development of the issues of immunity of international organizations and immunity of states, she called for coordinated efforts to develop general principles that would be advantageous to both situations. The delegate also recognized the efforts of the Committee in the area of dissemination and empowerment of the Inter-American Convention on the Law Applicable to International Contracts (Mexico Convention). The delegation also expressed thanks for the holding of the Course on International Law and the efforts to maintain the number of recipients of fellowships to take part in the course. She commended the positive nature of the meeting with legal counsels, which provided an opportunity for constructive dialogue, and she reiterated Mexico's commitment to the CJI. Finally, she remarked on the importance of submitting to the Committee topics of interest for states in the area of their prerogatives.

The delegate of Chile added his thanks for the work of the Inter-American Juridical Committee and asked the Chair for further explanations about meetings with representatives of law schools, in particular when it has held meetings away from its headquarters in Rio de Janeiro. He also asked about developments in the area of migration, an issue that poses a series of challenges for the domestic law of countries. He concluded by reaffirming his delegation's commitments to the Committee.

The delegate of Peru valued the substantial contribution made by the CJI to the development of international law and the work of the Organization, and urged states to take advantage of the Committee's substantive contributions. In that connection, she mentioned her delegation's interest in submitting a joint proposal with Mexico with a view to exploring the possibility of developing certain aspects of the Model Law on Access to Information. She praised the Committee's engagement with legal counsels and with the political bodies of the Organization, which produces an enriching exchange for all concerned.

The delegate of Uruguay reiterated his country's commitments to the Committee and acknowledged the invaluable work that it does.

The delegate of Nicaragua also thanked the Committee for its thorough report which contributes to inter-American international law in the areas that it addresses, providing frames of reference to governments in the juridical arena. He asked the Chair of the CJI for more information about the Committee's main contributions in the inter-American context and urged the Committee to promote awareness of the inter-American system in other world regions.

The delegate of Brazil conveyed his appreciation to all the members of the CJI for their contributions to the 2016 annual report and reaffirmed his country's support for the CJI. In light of the ambassador's presentation in the Council in the presence of the Chair of the CJI the previous day, the delegate mentioned the efforts of Brazil to increase the budget of the CJI and its interest in continuing to strengthen it. He expressed thanks and support for the initiative to engage with the legal counsels of foreign ministries.

The delegate of the Dominican Republic echoed the comments made earlier, recognized the excellence of the work of the CJI, and reiterated her country's support for the CJI's efforts in relation to the progressive development of international law.

The Representative of El Salvador to the OAS thanked the Committee for its efforts toward the unification and construction of law at the service of nations.

The Representative of Venezuela drew the attention of the Chair to developments in the area of representative democracy in the CJI and invited it to take into account background information and reports on the discussions of the states with respect to the interpretation of the Inter-American Democratic Charter on pending issues, such as early warning initiatives. Mindful of the Committee's independence, she asked that the use of Article 20 of the Democratic Charter be evaluated with great care and prudence, particularly where it may have implications in terms of the surrender of the sovereignty of states.

The delegation of Bolivia thanked the Chair for the presentation of the annual report and noted his delegation's interest in sending the Committee comments submitted by Member States with respect to the interpretation of the Inter-American Democratic Charter.

The Chair of the CJI expressed thanks for the remarks concerning the Committee's work and mentioned its appetite to continue contributing to the progressive development of law, bearing in mind the region's particular characteristics.

He reiterated the importance of dialogue with the political bodies of the Organization and with the legal counsels of foreign ministries, and urged that the latter be held periodically and, to the extent possible, with representatives from all the Member States' regions in attendance.

He said that sessions away from headquarters provided an opportunity for meetings with law schools. So it was that during the session held in Washington, D.C., in 2016, the full membership of the Committee held an event at the Washington College of Law and Georgetown University Law Center. He said that contact had also been made with law schools in Rio de Janeiro and that over the previous year a round table event had been held with the support of the American Association of Private International Law (ASADIP) and the Law School of the University of the State of Rio De Janeiro (UERJ).

On the subject of migration law, the Chair described developments in that regard and offered the good offices of the CJI to work on this and other topics, if there was political appetite for doing so. In that connection, he took note of the joint proposal of Mexico and Peru regarding access to information.

Among the different ways of promoting progressive development of the inter-American law, Dr. Salinas mentioned the presentations that the Committee gives each year in the United Nations International Law Commission in addition to underscoring how invaluable the Course on International Law is.

As regards the comments of Venezuela, Dr. Salinas explained the origin of the mandate, which to some extent stemmed from a concern once raised by former Secretary General José Miguel Insulza, who mentioned an interest in improving the implementation mechanisms of the Inter-American Democratic Charter without amending the Charter itself. He also mentioned that this was a developing issue and that no report had been adopted on the subject. Finally, he confirmed that all the background information mentioned had been taken into account, as had the reports of states and the CJI itself, which had been considering the issue for many years. He added that the Committee was able to exercise the necessary prudence in producing a report that the states would find useful and valuable.

Ambassador Jennifer Loten, Permanent Representative of Canada to the Organization and Chair of the Committee on Juridical and Political Affairs, recognized the richness of the work that the Inter-American Juridical Committee does both for the OAS and for the region, the legacy of which was visible, not only in the content of what had been presented, but also in the interest demonstrated by the Committee in working with delegations to support the implementation of the instruments adopted.

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4. Report of the Chairman of the Inter-American Juridical Committee to the United Nation's International Law Commission

Document

CJI/doc.543/17 Report of the Chairman of the Inter-American Juridical Committee to the International Law Commission of the United Nations
(Presented by Dr. Hernán Salinas Burgos)

As to CJI's presence before the UN International Law Commission, the Chairman explained that his presentation sparked technical discussion on two major topics, immunity of international organizations and representative democracy. He also noted interest in the work of the Committee in the sphere of private international law, a field that is not under the purview of the UN Commission, and on this score, he mentioned the work of the Committee on the topic of consumer law. Lastly, there was interest in reinforcing the presence of UN members on the CJI.

Dr. Joel Hernández was pleased with the opportunity provided for dialogue with the UN Commission, which paves the way for reciprocal arrangements and helps to avoid duplication of efforts. He noted that on the subject of his rapporteurship, the Commission had last spoken out in the 1950s. He asked the Chairman whether there was any consultation on the topic of immunities, and the response was that there was interest in learning about developments with regard to the subject of immunity of States in light of the Convention on the subject.

Having once been a member of the UN Commission, Dr. Baena Soares noted that the Committee is more homogenous and tangible results can be noticed, in view of its working procedures. He also reaffirmed the importance of hosting a member in Rio de Janeiro in order to engage in dialogue. On this score, the Committee Chairman reported on the presence of Dr. Marcelo Vázquez-Bermúdez during the second week of the Committee's session.

The report submitted by doctor Hernán Salinas Burgos to the International Law Commission of the United Nations is enclosed.

CJI/doc.543/17

REPORT OF THE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE, TO THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS

(Presented by Dr. Hernán Salinas Burgos)

I. Background and membership

Thank you for the invitation; I am pleased to convey greetings to all of you on behalf of my colleagues at the Juridical Committee and to present this report on the progress of our work in 2016.

The Inter-American Juridical Committee is one of the principal organs through which the OAS accomplishes its purposes. It serves the Organization as an advisory body on juridical matters; promotes the progressive development and codification of international law; studies legal problems relating to integration and pursues the harmonization of national laws, taking into account, in particular, different systems and legal traditions that exist in our continent - civil law and common law.

The Committee is composed of 11 national jurists from the Member States elected by the General Assembly: Joel Antonio Hernández García (Mexico), our Vice-President; João Clemente Baena Soares (Brazil); Miguel Aníbal Pichardo Olivier (Dominican Republic); Ana Elizabeth Villalta Vizcarra (El Salvador); Ruth Stella Correa Palacio (Colombia), José Antonio Moreno

Rodríguez (Paraguay), Duncan B. Hollis (United States); Alix Richard (Haiti) and Juan Cevallos Alcivar (Ecuador). The last three became members this year and joined the Committee during the 90th regular session held this past March in Rio de Janeiro. For my part, I am the Chairman of the Committee and come from Chile.

II. Topics and mandates

In 2016, the Inter-American Juridical Committee held two regular sessions and adopted two reports in response to mandates it had initiated on its own accord: "Principles and Guidelines on Public Defense in the Americas" (CJI/doc.509/16 rev. 2); and "Electronic Warehouse Receipts for Agricultural Products" (CJI/doc.505/16 rev. 2).

- **Principles and Guidelines on Public Defense in the Americas**

Through an initiative of the Inter-American Association of Public Defenders (AIDEF), which had originally submitted a proposal to the Committee, the plenary adopted said Principles and Guidelines, which provide for adequate protection of the right to legal defense. Access to justice is presented as a fundamental human right that is not limited to ensuring admission to a court but applies to the entire process. The Principles and Guidelines refer to the work of public defenders in cost-free state-provided legal assistance services and their role in prevention, reporting, and support for victims of torture and other inhuman, cruel, and degrading treatment. They also draw attention to the importance of the independence, and the functional, financial and/or budgetary autonomy of official public defender services, which should not be limited to criminal jurisdiction but should encompass legal assistance in all jurisdictions. Lastly, States are urged to eliminate obstacles that may impair or limit access to a public defender and to provide their citizens with access to justice through cost-free state-provided legal assistance services.

- **Electronic Warehouse Receipts for Agricultural Products**

The Committee adopted a set of "Principles for Electronic Warehouse Receipts for Agricultural Products" out of concerns over the lack of access to credit in the agricultural sector. Warehousing means that producers are no longer forced to sell their products immediately upon harvest, and can delay sale until prices are more favorable. Warehouse receipt financing thus impacts access to credit, since it is a form of asset-based lending where the stored products are used as collateral, which increases lender confidence in loan recovery. This is relevant for the economy in our countries, considering the impact of the agricultural sector on economic growth and development. We urge the political bodies to endorse and adopt these principles.

- **Consumer protection**

In 2016, the Committee also adopted a resolution on "International Protection of Consumers" (CJI/RES. 227 (LXXXIX-O/16), which brings attention to consumer protection issues at national and international levels, and also issues a new mandate entitled "online arbitration of disputes arising from cross-border consumer transactions", given the challenges consumers face in their cross-border dealings, in particular, and given the need for adequate methods for settling disputes that may arise in such dealings.

- **Agenda of the Committee**

Finally, I would like to inform you that at our most recent working session, held in March of this year, we concluded our work on the topic of immunity of States and reviewed new studies on immunity of international organizations; law applicable to international contracts; representative democracy; mechanisms to improve implementation of the Inter-American Democratic Charter; application of the principle of conventionality; and online arbitration in cross-border consumer transactions. Note that the Committee, using its authority to act on own initiative, added two new items to its agenda: one on binding and non-binding agreements, and another on the validity of foreign judicial decisions.

2. Proposed mandates of the General Assembly

At the session in October 2016, the Committee added to its agenda the two new mandates proposed by the General Assembly in June 2016 in the Dominican Republic: "conscious and effective regulation of business in the area of human rights" and "protection of cultural heritage assets," and, at the session held in March of this year, the Committee addressed both matters.

On the first matter, the CJI has prepared a compilation of good practices, legislation and jurisprudence on the topic, together with alternatives to advance conscious and effective regulation of companies from a human rights point of view. The report includes a proposal of the "Guidelines Concerning Corporate Social Responsibility in the Area of Human Rights and Environment in the Americas", approved in the year 2014 by the Committee.

With regard to the protection of cultural heritage assets, the Committee's report analyses regional and international legal instruments, proposes further development of national legislation and invites Member States to develop cooperative mechanisms in order to facilitate the implementation of existing instruments, in particular, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 and the Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations of 1976 (Convention of San Salvador). Furthermore, it proposes the development of a "Users Guide" that would enable the implementation of conventional instruments and *softlaw*, including design of strategies for the recovery and restitution of cultural heritage assets which are part of the identity and richness of our region.

I would like to highlight the approval of the **Model Law on the Simplified Corporation by** the General Assembly of the OAS that was held in June of this year in Cancun, Mexico. This model law presents a hybrid form that reduces costs and formalities of incorporation for micro and small businesses, taking advantage of Colombia's experience in this field. In the Committee's opinion, incorporation of this model law into national legislation can help to promote economic and social development in Member States. Without imposing substantive obligations on States, the resolution clearly states that it is an invitation to Member States "to adopt, in accordance with their domestic laws and regulatory framework, those aspects of the Model Law on the Simplified Corporation that are in their interest".

In addition, the General Assembly requested Member States to follow-up recently completed mandates in regard to "Cultural Heritage Assets", "Conscious and Effective Regulation of Business in the Field of Human Rights and "Electronic Warehouse Receipts for Agricultural Products". This is very positive given that it will enable the Committee to know what follow-up actions that States will take on these issues as dealt with by the Committee.

III. Activities

For the members of the CJI, given the Committee's commitment to doing useful work that serves the interests of Member States, these days it is of paramount importance to obtain the views of the political organs of the Organization together with adequate feedback and dialogue, especially with the political organs of the OAS, which must serve to benefit Member States.

In that effort, and mindful of its authority to act on its own initiative, the Committee has prepared a work plan based on exchange with States, especially those that replied to a questionnaire prepared towards that end, as well as the important input afforded us by members of the Committee.

Feedback from different actors has been essential in the search for emerging new issues for inclusion onto the Committee's agenda. In 2016, the Committee held a working meeting at the Permanent Council's headquarters, in Washington, D.C. and another at CJI headquarters, in Rio de Janeiro. At our meeting in Washington, D.C., for a second consecutive year, the Committee met with the Secretary General during sessions of the Committee and followed up on matters of interest in the area of international law. The Secretary General expressed his interest in matters related to the Inter-American Democratic Charter, especially Article 20 and the concept of "good government"; legislation on political parties, protection of children from sexual abuse and violence; and matters related to cyber security for the punishment of "phishing" scams, especially those that are transnational in nature.

Meeting with legal advisors and representatives of legal advisory services of Member States:

I wish to take this opportunity to recognize this initiative, which was held during the October 2016 session. A rich exchange took place on matters of interest in the areas of public and private international law, such as immunities, cyber security, international commerce, institutional agreements, and consumer law. Also presented were general proposals to recognize the practical

benefit of the Committee's work and to promote coordination with other regional and international bodies so as to avoid duplication of efforts. Taking part on that occasion were the legal advisor's offices of the Ministries of Foreign Affairs of Brazil, Chile, United States, Mexico, Paraguay, Peru, and Uruguay.

Round table discussions: In the last year, the Committee made efforts to encourage among its members discussion of matters of private international law and with specialists in the region. Towards that end, round table discussions were held at its last two working sessions.

At the April 2016 session, held in Washington, D.C., the meeting discussed the future of private international law in the region and some topics were explored. The guests expressed their views on the challenges of private international law, especially the need for flexibility in new norms. As for specific topics, they proposed a number of issues for the Committee, among them, consumer protection and trade practices and customs in private international law. Notable among participants were eminent professors and practitioners from the United States and Canada.

At the October 2016 session, held in Rio de Janeiro, the Committee, together with the American Association of Private International Law (ASADIP) and the University of the State of Rio de Janeiro (UERJ) organized a meeting at the UERJ Law School to discuss three major topics: the work of the OAS in the codification and promotion of private international law; international protection of consumers; and international contracts. Presentations were given by eminent professors from Brazil and other countries, CJI members, and staff members of the Department of International Law. Participants included a hundred law students, thereby enriching the event.

Course on International Law: The Committee, with support from the Department of International Law, from October 3 to 21, 2016, held the XLIII Course on International Law. In attendance were 15 scholarship recipients from different countries of the Hemisphere, funded by the OAS, as well as 20 self-funded participants from both Brazil and foreign states. To be noted among panelist contributions was that of former CJI Chairman Dr. Fabián Novak Talavera, who, at the inauguration of the Course, gave a lecture on the legal developments of the Committee. Also to be mentioned was the presence of Dr. Antonio Augusto Cançado Trindade, Judge of the International Court of Justice; Dr. Antonio Herman Benjamin, Judge of the Supreme Court of Justice of Brazil; and Ambassador Luis Alfonso de Alba Góngora, Permanent Representative of Mexico to the OAS, who honored us as well by his presence at CJI headquarters.

Web page: Through the good offices of our Technical Secretariat, the Department of International Law of the Secretariat for Legal Affairs, the Committee's web page was modified to facilitate access to the items on its agenda and to the annual reports from 1994 onwards.

Hereby I express our gratitude and reiterate the invitation that we have made so that one of your members may be able to visit us at the Committee's Headquarters and take note of the valuable work that is being achieved. Our next regular session will take place between the 7th and 16th of August at our quarters in Rio de Janeiro, Brazil.

Thank you very much.

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B. Course of International Law

The 44o Course on International Law was held in Rio de Janeiro, Brazil, from July 31to August 18, 2017. The purpose of this course is to ponder, debate, and update various issues pertaining to Public and Private International Law, as well as new legal development in the inter-American system. Panelists included distinguished professors from the Hemisphere and from Europe, judges, diplomats, members of the CJI and staff members of International Organizations and the OAS. The course was attended by 42 participants, among them 15 scholarship holders from a number of countries in the Hemisphere, financed by the OAS.

The Course Program was as follows:

OEA|OAS Curso de Derecho Internacional

XLIV International Law Course
July 31 – August 18, 2017
Hotel Pestana Rio Atlântica
Av. Atlântica, 2964 - Copacabana, Rio de Janeiro
PROGRAM

1st WEEK	
Monday July 31	
9:00 am – 9:30 am Foyer Sala Mauá	Student registration
9:30 am – 10:15 am Sala Mauá	Opening ceremony: • Welcome remarks **Hernán Salinas, Chairman, Inter-American Juridical Committee (CJI)** **Dante Negro, Director, Department of International Law** **Secretariat for Legal Affairs, OAS** • Official photograph
10:15am – 10:45 am	Reception
10:45 am – 11:10 am	Information session for students
11:10 am – 1:00 pm	*Introduction to the Inter-American System* **Professor: Dante Negro - Director, Department of International Law, OAS**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*Free*
Tuesday August 1	
9:00 am – 10:50 am	*The institution of diplomatic protection in contemporary international law* **Professor: Hernán Salinas – Chairman, Inter-American Juridical Committee (CJI)**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*International and Comparative Law* **Professor: Alejandro Rodiles – Fulltime Professor, Autonomous Technological Institute of Mexico (ITAM)**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*The Impact of Information and Communication Technologies on Private International Law* **Professor: María Mercedes Albornoz – Researcher and Professor, Centro de Investigación y Docencia Económicas (CIDE) (Mexico)**
Wednesday August 2,	
9:00 am – 10:50 am	*The institution of diplomatic protection in contemporary international law (continued)* **Professor: Hernán Salinas – Chairman, Inter-American Juridical Committee (CJI)**
10:50 am – 11:10 am	Recess

11:10 am – 1:00 pm	*Global security from an international law perspective* **Professor: Alejandro Rodiles – Fulltime Professor, Instituto Tecnológico Autónomo de México (ITAM)**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*Implementation of international humanitarian law in the countries of the Americas 40 years after the adoption of the Additional Protocols of 1977* **Professor: Gabriel Pablo Valladares – Legal Counsel, Regional Delegation, International Committee of the Red Cross (ICRC)**
Thursday August 3	
9:00 am – 10:50 am	*Global security from an international law perspective (conclusion)* **Professor: Alejandro Rodiles – Fulltime Professor, Instituto Tecnológico Autónomo de México (ITAM)**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*The institution of diplomatic protection in contemporary international law (conclusion)* **Professor: Hernán Salinas – Chairman, Inter-American Juridical Committee (CJI)**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	Free
Friday August 4	
9:00 am – 10:50 am	*Opportunities and challenges in international protection of refugees on the continents of the Americas* **Professor: Juan Carlos Murillo – Regional Legal Counsel, United Nations High Commission for Refugees (UNHCR)**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*Eradication of statelessness* **Professor: Juan Ignacio Mondelli – Regional Protection Officer (Statelessness), United Nations High Commissioner for Refugees (UNHCR)**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*War of jurisdictions – The State counterattacks* *Freedom of expression online: international effects of national jurisdiction* **Professor: Christian Perrone – Public Policy and International Law Consultant**
2nd WEEK	
Monday August 7	
9:00 am – 10:50 am	*Tools of the trade of the Inter-American Commission on Human Rights and its effectiveness* **Professor: Paulo Abrão – Executive Secretary, Inter-American Commission on Human Rights (IACHR)**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*Territory and jurisdiction: from a contemporary international law perspective* **Professor: María Teresa Infante – Ambassador of the Republic of Chile to the Netherlands**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*The principle of control of conventionality* **Professor: Ruth Correa – Member, Inter-American Juridical Committee**

Tuesday August 8	
9:00 am – 10:50 am	*2017-2021 Strategic Plan: objectives and strategies of the Inter-American Commission on Human Rights in a context of challenges* **Professor: Paulo Abrão – Executive Secretary, Inter-American Commission on Human Rights (IACHR)**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*Territory and jurisdiction: from a contemporary international law perspective (continued)* **Professor: María Teresa Infante – Ambassador of the Republic of Chile to the Netherlands**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*Current status of jurisdictional immunity, with special reference to jurisdictional immunity of States* **Professor: Carlos Mata – Member, Inter-American Juridical Committee**
Wednesday August 9	
9:00 am – 10:50 am	*Challenges to representative democracy in the digital world: from the perspective of the Inter-American system.* **Professor: Beatriz Ramacciotti – Professor of International Law**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*Territory and jurisdiction: from a contemporary international law perspective (conclusion)* **Professor: María Teresa Infante – Ambassador of the Republic of Chile to the Netherlands**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*International contracts* **Professor: José Antonio Moreno – Member, Inter-American Juridical Committee**
Thursday August 10	
9:00 am – 10:50 am	*Challenges to representative democracy in the digital world: from the perspective of the Inter-American system (continued)* **Professor: Beatriz Ramacciotti – Professor of International Law**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*The OAS: Protection and Defense of Democracy* **Professor: Jean-Michel Arrighi – Secretary for Legal Affairs, OAS**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*Protection of cultural heritage property* **Professor: Joel Hernández - Member, Inter-American Juridical Committee**
Friday August 11	
9:00 am – 10:50 am	*Challenges to representative democracy in the digital world: from the perspective of the Inter-American system (conclusion)* **Professor: Beatriz Ramacciotti – Professor of International Law**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*One further step in humanizing contemporary international law: the prohibition of nuclear weapons* **Professor: Antonio Augusto Cançado Trindade – Judge, International Court of Justice**
1:00 pm – 2:30 pm	Recess

2:30 pm – 4:30 pm	*One further step in humanizing contemporary international law: the prohibition of nuclear weapons* **Professor: Antonio Augusto Cançado Trindade – Judge, International Court of Justice**
3rd WEEK	
Monday August 14	
9:00 am – 10:15 am	*The OAS and the Inter-American System* **Professor: Jean-Michel Arrighi – Secretary for Legal Affairs, OAS**
	Recess
11:10 am – 1:00 pm	*The United Nations International Law Commission and its contribution to the international legal system* **Professor: Marcelo Vázquez-Bermúdez - Member, United Nations International Law Commission**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*International law and cyber security* **Professor: Duncan Hollis - Member, Inter-American Juridical Committee**
Tuesday August 15	
9:00 am – 10:50 am	*Control of constitutionality and conventionality of foreign law* **Professor: Didier Opertti - Professor of International Law, former Foreign Minister of Uruguay**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*Items on the current agenda of the International Law Commission: identifying customary international law, jus cogens, crimes against humanity* **Professor: Marcelo Vázquez-Bermúdez - Member, United Nations International Law Commission**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*Protection of personal data* **Professor: Elizabeth Villalta – Member United Nations International Law Commission**
Wednesday August 16	
9:00 am – 10:50 am	*Interpreting foreign investment protection treaties through arbitral precedents* **Professor: Raúl Vinuesa - Professor of International Law, Universidad de San Andrés, Argentina**
10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*Control of constitutionality and conventionality of foreign law (continued)* **Professor: Didier Opertti - Professor of International Law, former Foreign Minister of Uruguay**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*Items on the current agenda of the International Law Commission: criminal jurisdictional immunity of State officials, protection of the environment in connection with armed conflicts, protection of the atmosphere* **Professor: Marcelo Vázquez-Bermúdez – Member, United Nations International Law Commission**
Thursday August 17	
9:00 am – 10:50 am	*Interpreting foreign investment protection treaties through arbitral precedents (conclusion)* **Professor: Raúl Vinuesa - Professor of International Law, Universidad de San Andrés, Argentina**

10:50 am – 11:10 am	Recess
11:10 am – 1:00 pm	*Control of constitutionality and conventionality of foreign law (conclusion)* **Professor: Didier Opertti - Professor of International Law, former Foreign Minister of Uruguay**
1:00 pm – 2:30 pm	Recess
2:30 pm – 4:30 pm	*Practical exercises/evaluation of usefulness*
Friday August 18	
10:00 am – 10:45 am	Closing ceremony: • Closing remarks: **João Clemente Baena Soares** Member, Inter-American Juridical Committee **Jean Michel Arrighi** Secretary for Legal Affairs, OAS
10:45 am	Awarding of certificates
End of program	

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C. Relations and cooperation with other Inter-American bodies and with Regional and Global Organizations

Meetings sponsored by the Inter-American Juridical Committee during the 91st Regular Session, held in Rio de Janeiro, Brazil:

1) August 8, 2017: Visit from Commissioner Kathleen Quartey Ayensu

Dr. Kathleen Quartey Ayensu is a member of the International Law Commission of the African Union. On this occasion, she described the Commission, made up of 11 members and based in Ethiopia, and explained the mandates on its agenda. Major topics she cited included studies on delimitation and demarcation of borders in Africa, developments in the legal framework in the area of migration on the African continent, and promotion of the instruction, study and dissemination of international law and African Union law. As to this last topic, she invited the Committee to a seminar on international law scheduled for this year, where the central theme will be "economic and legal consequences of immigration, refugees and displaced persons," which will take place December 1 and 2, 2017. She noted that actions must be taken in areas of common interest, such as those of the UN International Law Commission and the Asian International Law Commission. In this regard, the Chairman asked for a list of topics that could give rise to common efforts, in order to exchange ideas and collaborate jointly. At this time, Commissioner Quartey was accompanied by Dr. Betelhem Arega Asmamow of the Secretariat of the Commission.

2) August 8, 2017: Visit from doctor Paulo Abrão

Dr. Abrão is the Executive Secretary of the Inter-American Commission on Human Rights (IACHR). On this opportunity, he explained the new strategic plan, which seeks to integrate aspects linked to monitoring and technical cooperation into the workings of the Commission. As he understands it, maintaining the case system in place entails complementary efforts and cooperation with the States to bring about better implementation of the standards established by the instruments in force. Additionally, he explained initiatives of the Executive Secretariat to build capacity for early warnings and for response to any situations that may arise (special monitoring, creative tracking and follow up mechanisms, overcoming structural problems, etc.). He described the recently created

rapporteurship on economic, social and cultural rights, which will deal with business and human rights, union rights and environmental rights. He also noted some of the subjects that have organized into thematic units, such as older adults, persons with disability, transitional justice and democracy. He echoed the Commission's interest in working to identify public policies relating to implementation of the strategies. Lastly, he stressed the importance of maintaining a spirit of complementarity and coordination with the Juridical Committee.

3) August 9, 2017: Visit from Ambassador María Teresa Infante

Dr. Maria Teresa Infante is Chile's Ambassador in the Netherlands and is one of the founders of the Latin American Society of International Law (SLADI). She explained that SLADI is a society, which was founded by foreign ministers and accomplished jurists, draws in new generations through the incorporation of academic networks. It also sets up study groups working on history-related topics and doctrinal foundations of a global nature. One of the challenges of the Society is to increase its power to convene and build a good database. Specifically, it requested the Committee to take part in its last session by speaking on the topic of effectiveness of conventions in the Inter-American system. In her presentation, she underscored the importance of disseminating the reports of the CJI, both among foreign ministries and in academia. In response to comments from the Committee members, she noted the work of other international law societies such as the American Society of International Law (ASIL) and the American Association of Private International Law (ASADIP). Additionally, she explained that presently the Society's concerns revolve around the way general international law responds to human persons, including respect for cultural or religious diversity. With respect to future endeavors, she noted that there are still many topics, about which the global rules warrant deep reflection and she cited as some challenges in the area of biological diversity and clashes of opinions as to making aggression a crime. As to the comment on representation in the Court of The Hague, the Ambassador felt that the main issue is not the presence of judges from different systems, whether they are Brazilians or Jamaicans, but she regretted the lack of discussion at the regional level about the type of candidates that we want to sit on that tribunal. In her view, we should seek dialogue between different views. At the conclusion, the Chairman thought it pertinent to deepen the relationship of the Committee with SLADI, because said forum offers a space to disseminate the work and initiatives of the CJI.

4) August 14, 2017: Visit from professor Mercedes Albornóz

Professor Mercedes Albornoz is a researcher associated with the *Centro de Investigación y Docencia Económicas* (CIDE) in Mexico. On this occasion, she offered her thoughts on the topic of contracts, which is shaping up as a predominant element in free trade processes. She explained the difficulties with interpretation of provisions of the Mexico Convention, which provides for principles such as party autonomy and establishes a subsidiary system based on the principle of proximity with respect to applicable law. As for choice of non-state law, she explained that one dynamic interpretation would involve a position of openness with respect to the principle of proximity along with closer ties. This could also function as a way to achieve justice and equity. The challenge posed by the Mexico Convention stems from the interpretation of certain provisions pertaining to respect for national law. All of this could account for the low number of ratifications of the Mexico Convention. She raised the importance of complementarity of the aforementioned Mexico Convention despite the interpretative difficulties, because it has served as a point of reference in the implementation of legal provisions at both the domestic and global level. In this context, the proposal of a guide by the Committee would help to assist different actors that are called upon to participate in the sphere of contracts. Dr. Villalta expressed her gratitude for the presence of Professor Albornoz and for her presentation and for the support provided to the process of drafting Dr. Moreno's instrument.

5) August 14, 2017: Visit from representatives of the Ibero-American Network for the protection of personal data

The Committee was visited by Dr. Felipe Rotondo, member of the Personal Data Regulatory and Control Unit of Uruguay, and Dr. Edgardo Martínez Rojas, Director General of Regulation and Consultation of the Secretariat of Data Protection of the Federal Institute of Transparency, Access to Information and Personal Data Protection of Mexico, both in their capacity as representatives of the Ibero-American Data Protection Network (RIPD). Dr. Felipe Rotondo presented on the work of the Network, which was founded in 2003 for the purpose of facilitating cooperation between countries and striking a balance in personal data protection, and whose members are individuals from Latin America, Spain and Portugal, in a climate of heavy influence of international trade and new technologies. He then explained the history of the Ibero-American Personal Data Protection Standards," which were adopted in June of this year in Santiago, Chile, and is the most advance document of its kind in regulatory matters and is very much a part of the promotional activities of the Network. Dr. Edgardo Martínez explained in general the ten elements comprising the Ibero-American Standards: subjects of the norm; what it seeks to protect; service providers; data transfer; proactive measures; oversight authority; claims and sanctions; and, international cooperation. He also discussed developments of freedoms that undermine data protection. Accordingly, tools to confront violations are required, and this should be in both the legal as well as the social and cultural sphere. Public policies should support technological advancement and user responsibility. Specifically, OAS participation should encourage international cooperation and, to the extent possible, help to move toward the adoption of an Inter-American data and privacy protection instrument. As to international cooperation, it has become necessary to work jointly to confront evasive conduct of companies. In the sphere of the Americas, we need rules on international cooperation and, in this regard, he offered the standards developed by the Network as imput to serve as a benchmark for the work of the OAS on the subject. In response to the Committee Members' remarks, Dr. Rotondo explained that the drafting of a binding instrument in the sphere of the Americas would be the ideal thing to do, but in his personal view, he felt that conditions are not ripe for this to happen. Additionally, he noted that the Ibero-American standards could become integrated into the English-speaking States. In this regard, he cited topics relating to data transfer where there is a chance of achieving progress. He stressed that the standards put forward the principle of proactive security, whereby technical administrative measures are taken prior to infringements. On the issue of notifications, the Standards set rules that respect sovereignty and encourage defining basic elements, regardless of differences that may exist domestically. The important thing is to empower the citizens of the region. Otherwise, the proposal is very similar to the European Union framework, which provides for advancing jointly through basic harmonized rules.

6) August 15, 2017: Visit from doctor Marcelo Vázquez

Dr. Vázquez is a member of the United Nations International Law Commission and Alternate representative of the Ecuadorian Mission to the OAS. On this occasion, he expressed his gratitude for the visit made by a Committee member each year to Geneva and his interest in strengthening said exchange. He explained that over the course of this year, the Commission had embarked upon a new five-year period that promises to be productive because of the high number of items on the agenda, including the following: sources of international law (in particular, identification of customary international law), crimes against humanity, with a view toward drafting an international convention on the subject matter (it is anticipated that the rules will establish adequate guarantees with a view toward bringing justice while avoiding political influences), and determination of the legal nature and effects of a peremptory norm of general international law (*jus cogens*) in order to establish legal effects. He also noted that in the context of the succession of States, the Commission works on responsibility of the State for internationally illicit acts. As to the area of international environmental law, the Commission has two items of interest on its agenda: protection of the atmosphere and protection of the environment in situations of armed conflict. Lastly, he mentioned the efforts of the Commission in

identifying new topics, such as general principles of law and evidence before the international Court and tribunals. He explained that on May 21, 2018 the 60th anniversary of the Commission will be celebrated in New York, a prime opportunity to engage in dialogue with the delegates to the 6th UN Commission and also meetings attended by academicians and scholars to be able take stock of the work done thus far. He concluded by expressing the great importance that the Commission attaches to work that has a bearing on the community of States. In response to several comments of the Committee members, Dr. Vázquez cited areas of agreement and, for this reason, he deemed as essential being kept up-to date on what each body is doing through reciprocal visits by their members. Regarding long term topics, such as ship wreckage or data protection, these issues have been put onto the active schedule provided that they do not clash with topics that require priority attention. In general, he noted that the *opinio juris* has been conceived as legal conviction of the States. Also, work has been done on aspects of "particular" custom with reference to its regional or local aspects or also its influence on States belonging to several regions. As to identifying the vehicle for final products and possible exhaustion of treaties, he explained that the final form of a product depends on the intrinsic nature of the topic. In the initial draft of the Statute of the International Criminal Court, drafting of a treaty on the subject was taken into account. With respect to the risks of fragmentation between the legal regimes and the appearance of multiple tribunals, the preference was for the format of conclusions with commentary. The most recent convention adopted by the UN based on a proposal of the Commission was in 2002, while in 2001, the Commission adopted a report on the responsibilities of States, following one of the Commission's own recommendations, opposing the idea of a convention. There are topics, which due to their intrinsic nature, are more aptly worded as conclusions with commentary. Regarding the topic of general principles of law, the latest version of the proposal has been posted on the website. The objective is to clarify the legal nature, their origin and relationship to the domestic and international system, the roles that they have been playing and that have been identified by international courts. The Chairman thanked Ambassador Marcelo Vázquez for presenting a wide-ranging and rich vision of the work of the Commission.

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